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08/17/2009 03:36 PM

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"Noether, Lauren" <Lauren.Noether@doj.nh.gov>, Edie

cc

bcc

Subject Portsmouth

Enclosed are the following documents which were filed in the federal district court of NH today (Aug 17, 2009), docket number 1:09-cv-283 :

- Complaint
- Civil cover sheet
- Notice of lodging of consent decree
- Consent decree
- Certificate of service

Next steps: publication of notice of lodging of the consent decree in federal register; 30 day public comment period; if no comments are received, motion to enter filed (assented to, I'll need the City's assent at that time); motion to terminate 1990 consent decree (also assented to, I'll need NH and City's assent at that time).



ENV_ENFORCEMENT-#1505254-v1-Portsmouth_Complaint_Final_08-09_FILE_PDF.PDF



ENV_ENFORCEMENT-#1505264-v1-Portsmouth_Civil_Cover_Sheet_FILE_pdf.PDF



ENV_ENFORCEMENT-#1505255-v1-Portsmouth_Notice_of_Lodging_of_CD_Final_FILE_pdf.PDF



ENV_ENFORCEMENT-#1505267-v1-Portsmouth_consent_decree_final_08-09_LODGE_PDF.PDF



ENV_ENFORCEMENT-#1505270-v1-Portsmouth_Certificate_of_Service_Final_08-09_FILE_pdf.PDF

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

UNITED STATES OF AMERICA,

Plaintiff,

v.

CITY OF PORTSMOUTH, NEW HAMPSHIRE,

Defendant.

CIVIL ACTION NO.

COMPLAINT

Plaintiff, the United States of America, through its undersigned attorneys, and at the request of the Administrator of the United States Environmental Protection Agency (EPA), alleges as follows:

NATURE OF ACTION

1. This is a civil action brought against the City of Portsmouth, New Hampshire ("City") pursuant to Section 309(b) and (d) of the Clean Water Act ("CWA" or "the Act"), 33 U.S.C. § 1319(b) and (d). The claims arise from the City's failure to comply with its National Pollutant Discharge Elimination System ("NPDES") Permit issued in accordance with Section 402 of the Clean Water Act, 33 U.S.C. § 1342.

JURISDICTION/VENUE/NOTICE

2. This Court has jurisdiction over the subject matter of this action pursuant to Section 309(b) of the CWA, 33 U.S.C. § 1319(b), and pursuant to 28 U.S.C. §§ 1331, 1345, and 1355.

3. Venue is proper in this district pursuant to Section 309(b) of the CWA, 33 U.S.C.

§ 1319(b).

4. Notice of the commencement of this action has been given to the State of New Hampshire pursuant to Section 309(b) of the CWA, 33 U.S.C. § 1319(b).

DEFENDANT

5. The City of Portsmouth is a municipality incorporated under the laws of the State of New Hampshire ("State").

6. The City is a "municipality" within the meaning of Section 502(4) of the Act, 33 U.S.C. § 1362(4).

7. The City is a person within the meaning of Section 502(5) of the Act, 33 U.S.C. § 1362(5).

INTERVENING PLAINTIFF

8. Section 309(e) of the Act, 33 U.S.C. § 1319(e), provides:

Whenever a municipality is a party to a civil action brought by the United States under this section, the State in which such municipality is located shall be joined as a party. Such State shall be liable for payment of any judgment or any expenses incurred as a result of complying with any such judgment entered against the municipality in such action, to the extent that the laws of that State prevent the municipality from raising revenues needed to comply with such judgment.

9. The State has committed to join this action pursuant to Section 309(e) of the CWA, 33 U.S.C. § 1319(e), as an intervening plaintiff. The United States reserves all claims which it may have against the State under Section 309(e).

STATUTORY BACKGROUND

10. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants into navigable waters of the United States except in compliance with the terms and

conditions of a NPDES permit issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342.

11. Section 402 of the Act, 33 U.S.C. § 1342, provides that the Administrator of EPA may issue permits under the NPDES program for the discharge of any pollutant into the navigable waters of the United States upon such specific terms and conditions as the Administrator may prescribe.

12. Section 309(b) and (d) of the CWA, 33 U.S.C. § 1319(b) and (d), authorizes the commencement of an action for civil penalties and injunctive relief against any person who violates Section 301(a) of the CWA, 33 U.S.C. § 1311(a), or any condition or limitation in a permit issued under Section 402 of the CWA, 33 U.S.C. § 1342.

GENERAL ALLEGATIONS

13. Pursuant to Section 402 of the Act, 33 U.S.C. § 1342, EPA issued NPDES Permit No. NHO100234 to the City on April 10, 2007 (the 2007 Permit), with an effective date of August 1, 2007, superseding a permit issued on January 18, 1985 (the 1985 Permit) and effective through July 31, 2007.

14. At all times relevant to this complaint, the City's Permits provide(d) that discharges from the City's combined sewer overflow ("CSO") outfalls must not cause water quality standards violations.

Count 1

NPDES Permit CSO Violations

15. The United States realleges and incorporates by reference the allegations in paragraphs 1 through 14 above as though fully set forth herein.

16. During the past five years, the City's CSO outfalls have discharged wastewater to

the Piscataqua River and South Mill Pond on numerous occasions.

17. The combined sewage the City discharged and continues to discharge to the Piscataqua River and South Mill Pond through the CSO outfalls contained and contains concentrations of E. coli and coliform bacteria that caused and continue to cause water quality standard violations in the Piscataqua River and South Mill Pond.

18. The City's combined sewer outfalls are point sources within the meaning of Section 502(14) of the Act, 33 U.S.C. § 1362(14).

19. Bacteria, including E. coli bacteria and coliform bacteria, are pollutants within the meaning of Section 502(6) of the Act, 33 U.S.C. § 1362(6).

20. The Piscataqua River, which discharges to the Atlantic Ocean, and South Mill Pond, which discharges to the Piscataqua River, are navigable waters within the meaning of Section 502(7) of the Act, 33 U.S.C. § 1362(7).

21. By discharging wastewater that caused and continues to cause water quality standards violations in the Piscataqua River and South Mill Pond in contravention of its applicable NPDES Permit conditions, the City violated and continues to violate its NPDES Permit and Section 301(a) of the CWA, 33 U.S.C. § 1311(a)

22. Pursuant to Section 309(b) and (d) of the CWA, 33 U.S.C. § 1319(b) and (d), and the Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701, any person who violates any condition or limitation in a permit issued under Section 402 of the CWA, 33 U.S.C. § 1342, is liable for injunctive relief and for civil penalties not to exceed \$27,500 per day for each violation occurring prior to and including March 15, 2004; \$32,500 per day for each violation occurring after March 15, 2004 but prior to and including January 12, 2009; and \$37,500 per day for each

violation occurring after January 12, 2009.

Count 2

NPDES Effluent Limit Violations

23. The United States realleges and incorporates by reference the allegations of paragraphs 1 through 22 above as though fully set forth herein.

24. The 2007 Permit contains, among other conditions, limitations on the concentration of 5-day Biochemical Oxygen Demand and Total Suspended Solids that the City may discharge in effluent from its waste water treatment plant located at Peirce Island in Portsmouth, New Hampshire to the Piscataqua River.

25. Ever since the 2007 Permit became effective on August 1, 2007, the effluent that the City has discharged to the Piscataqua River from a point source at its Peirce Island treatment plant has consistently containing 5-day Biochemical Oxygen Demand and Total Suspended Solids in excess of the concentrations that the 2007 Permit allows.

26. Five-day Biochemical Oxygen Demand and Total Suspended Solids are pollutants within the meaning of Section 502(6) of the Act, 33 U.S.C. § 1362(6).

27. By discharging effluent with 5-day Biochemical Oxygen Demand and Total Suspended Solids in concentrations greater than the 2007 Permit allows, the City has violated the 2007 Permit and Section 301(a) of the CWA, 33 U.S.C. § 1311(a)

28. Pursuant to Section 309(b) and (d) of the CWA, 33 U.S.C. § 1319(b) and (d), and the Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701, any person who violates any condition or limitation in a permit issued under Section 402 of the CWA, 33 U.S.C. § 1342, is liable for injunctive relief and for civil penalties not to exceed \$27,500 per day for each violation

occurring prior to and including March 15, 2004; \$32,500 per day for each violation occurring after March 15, 2004 but prior to and including January 12, 2009; and \$37,500 per day for each violation occurring after January 12, 2009.

RELIEF SOUGHT

Wherefore, Plaintiff, the United States of America, respectfully requests that the Court grant the following relief:

- A. Order the City of Portsmouth to eliminate combined sewer overflows from its collection system that cause violations of water quality standards in the Piscataqua River and South Mill Pond;
- B. Order the City of Portsmouth to make improvements to its Peirce Island waste water treatment plant or take such other action as necessary to comply with the BOD₅ and Total Suspended Solids effluent limits in the 2007 Permit;
- C. Order the City of Portsmouth to operate its wastewater treatment facility to maximize pollutant removal;
- D. Order the City to pay a civil penalty not to exceed \$27,500 per day for each violation occurring prior to and including March 15, 2004; \$32,500 per day for each violation occurring after March 15, 2004 but prior to and including January 12, 2009; and \$37,500 per day for each violation occurring after January 12, 2009; and

E. Grant such other relief as the Court deems just and proper.

Respectfully submitted,

JOHN C. CRUDEN
Acting Assistant Attorney General
Environment and Natural Resources Division
United States Department of Justice

/s/ Peter M. Flynn
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Dated: August 17, 2009

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CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I. (a) PLAINTIFFS

UNITED STATES OF AMERICA

(b) County of Residence of First Listed Plaintiff _____
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorney's (Firm Name, Address, and Telephone Number)
Peter M. Flynn, Senior Attorney, Env. & Natural Resources Division, EES
Ben Franklin Station, P.O. Box 7611
Washington, DC 20044-7611, (202) 514-4352

DEFENDANTS

CITY OF PORTSMOUTH, NEW HAMPSHIRE

County of Residence of First Listed Defendant Rockingham
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE
LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☒ 1 U.S. Government Plaintiff
☐ 2 U.S. Government Defendant
☐ 3 Federal Question (U.S. Government Not a Party)
☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- | | | | | | |
|---|----------------------------|----------------------------|---|----------------------------|----------------------------|
| | PTF | DEF | | PTF | DEF |
| Citizen of This State | <input type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury PERSONAL INJURY <input type="checkbox"/> 362 Personal Injury - Med. Malpractice <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 R.R. & Truck <input type="checkbox"/> 650 Airline Regs. <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act IMMIGRATION <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 463 Habeas Corpus - Alien Detainee <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 892 Economic Stabilization Act <input checked="" type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes
REAL PROPERTY <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	CIVIL RIGHTS <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 440 Other Civil Rights	PRISONER PETITIONS <input type="checkbox"/> 510 Motions to Vacate Sentence Habeas Corpus: <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition		

V. ORIGIN

(Place an "X" in One Box Only)

- ☒ 1 Original Proceeding
☐ 2 Removed from State Court
☐ 3 Remanded from Appellate Court
☐ 4 Reinstated or Reopened
☐ 5 Transferred from another district (specify) _____
☐ 6 Multidistrict Litigation
☐ 7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):

33 U.S.C. 1319(b), (d)

Brief description of cause:

Clean Water Act

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23

DEMAND \$

CHECK YES only if demanded in complaint:

JURY DEMAND: ☐ Yes ☒ No

VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE Norman H. StahlDOCKET NUMBER 89-234-S

DATE

08/17/2009

SIGNATURE OF ATTORNEY OF RECORD

/s/ Peter M. Flynn

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____

INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44

Authority For Civil Cover Sheet

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

I. (a) Plaintiffs-Defendants. Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.

(b) County of Residence. For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)

(c) Attorneys. Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".

II. Jurisdiction. The basis of jurisdiction is set forth under Rule 8(a), F.R.C.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.

United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here.

United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.

Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.

Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; federal question actions take precedence over diversity cases.)

III. Residence (citizenship) of Principal Parties. This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.

IV. Nature of Suit. Place an "X" in the appropriate box. If the nature of suit cannot be determined, be sure the cause of action, in Section VI below, is sufficient to enable the deputy clerk or the statistical clerks in the Administrative Office to determine the nature of suit. If the cause fits more than one nature of suit, select the most definitive.

V. Origin. Place an "X" in one of the seven boxes.

Original Proceedings. (1) Cases which originate in the United States district courts.

Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441. When the petition for removal is granted, check this box.

Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.

Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.

Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.

Multidistrict Litigation. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407. When this box is checked, do not check (5) above.

Appeal to District Judge from Magistrate Judgment. (7) Check this box for an appeal from a magistrate judge's decision.

VI. Cause of Action. Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC 553
Brief Description: Unauthorized reception of cable service

VII. Requested in Complaint. Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.

Demand. In this space enter the dollar amount (in thousands of dollars) being demanded or indicate other demand such as a preliminary injunction.

Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.

VIII. Related Cases. This section of the JS 44 is used to reference related pending cases if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.

Date and Attorney Signature. Date and sign the civil cover sheet.

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEW HAMPSHIRE

_____)	
UNITED STATES OF AMERICA,)	
Plaintiff,)	
v.)	Civ. No.
CITY OF PORTSMOUTH, NEW HAMPSHIRE)	
Defendant.)	
_____)	

NOTICE OF LODGING OF CONSENT DECREE

Contemporaneously with this Notice, a proposed Consent Decree is being lodged with the Court for public comment, pursuant to 28 C.F.R. § 50.7. The proposed Consent Decree is filed as an attachment to this Notice. Notice of the lodging of the proposed Consent Decree, and the opportunity to comment thereon, will soon be published in the Federal Register. The United States will receive public comment on the proposed Consent Decree for the requisite 30-day period. During the pendency of the public comment period, no action is required of this Court. After the public comment period has expired, the United States will file a motion seeking the Court's approval of the Consent Decree unless comments are filed with the Department of Justice during the comment period demonstrating that the Consent Decree is inappropriate, improper or inadequate.

In the meantime, the United States requests that the Court take no action with respect to the proposed Consent Decree until the United States moves for entry of the Consent Decree or otherwise advises the Court.

Respectfully submitted,

FOR THE UNITED STATES

JOHN C. CRUDEN
Acting Assistant Attorney General
Environmental & Natural Resources Division
United States Department of Justice

/s/ Peter M. Flynn

PETER M. FLYNN

Senior Attorney
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August 17, 2009

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(617) 918-1735

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

UNITED STATES OF AMERICA,

Plaintiff,

STATE OF NEW HAMPSHIRE,

Plaintiff-Intervenor,

v.

CITY OF PORTSMOUTH, NEW HAMPSHIRE,

Defendant.

CIVIL ACTION NO.

CONSENT DECREE

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Plaintiff, the United States of America, on behalf of the United States Environmental Protection Agency ("EPA"), has filed a Complaint in this action, concurrently with this Consent Decree, alleging that Defendant, the City of Portsmouth, New Hampshire ("the City") violated Section 301(a) of the Clean Water Act ("CWA"), 33 U.S.C. §1301(a).

Plaintiff-Intervenor, the State of New Hampshire ("State"), has filed a Complaint-in-Intervention alleging that the City violated the New Hampshire Water Pollution and Waste Disposal Act, NH RSA 485-A ("New Hampshire Act");

The Complaint and Complaint-in-Intervention allege that the City is violating its National Pollutant Discharge Elimination System ("NPDES") permit effluent limitations for discharges from the City's Peirce Island wastewater treatment plant and permit conditions applicable to discharges from overflow points in the City's combined wastewater collection system; and

The Parties recognize, and the Court by entering this Consent Decree finds, that this Consent Decree has been negotiated by the Parties in good faith and will avoid litigation among the Parties, and that this Consent Decree is fair, reasonable, and in the public interest.

NOW, THEREFORE, with the consent of the Parties, IT IS HEREBY ADJUDGED, ORDERED, AND DECREED as follows:

I. JURISDICTION AND VENUE

1. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331, 1345, and 1355, Section 309(b) of the CWA, 33 U.S.C. § 1319(b), and Section 12 of the New Hampshire Act, NH RSA 485-A:12, and over the Parties. Venue lies in this District pursuant to Section 309(b) of the CWA, 33 U.S.C. § 1319(b), and 28 U.S.C. §§ 1391(b) and (c) and 1395(a), because the City is located in this judicial district. For purposes of this Decree, or any action to enforce this Decree, the City consents to the Court's jurisdiction over this Decree and any such action and over the City and consents to venue in this judicial district.

2. For purposes of this Consent Decree, the City agrees that the Complaint states claims upon which relief may be granted pursuant to Section 309(b) of the CWA, 33 U.S.C. § 1319(b), and 28 U.S.C. §§ 1331, 1345, and 1355. The Court has jurisdiction over the claims in the State's Complaint-in-Intervention under the doctrine of pendent jurisdiction.

II. APPLICABILITY

3. The obligations of this Consent Decree apply to and are binding upon the United States and the State, and upon the City and any successors, assigns, or other entities or persons otherwise bound by law.

4. No transfer of ownership or operation of the Facility, whether in compliance with the procedures of this Paragraph or otherwise, shall relieve the City of its obligation to ensure that the terms of the Consent Decree are implemented. At least 30 Days prior to such transfer, the City shall provide a copy of this Consent Decree to the proposed transferee and shall simultaneously provide written notice of the prospective transfer, together with a copy of the proposed transfer agreement, to EPA Region I, the United States Attorney for the District of New Hampshire, and the United States Department of Justice, in accordance with Section XII. Any attempt to transfer ownership or operation of the Facility without complying with this Paragraph constitutes a violation of this Consent Decree.

5. The City shall provide a copy of this Consent Decree to all officers, employees, and agents whose duties might reasonably include compliance with any provision of this Decree, as well as to any contractor retained to perform work required under this Consent Decree. The City shall condition any such contract upon performance of the work in conformity with the terms of this Consent Decree.

6. In any action to enforce this Consent Decree, the City shall not raise as a defense the failure by any of its officers, directors, employees, agents, or contractors to take any actions necessary to comply with the provisions of this Consent Decree.

III. DEFINITIONS

7. Terms used in this Consent Decree that are defined in the CWA or in regulations promulgated pursuant to the CWA shall have the meanings assigned to them in the CWA or such regulations, unless otherwise provided in this Consent Decree. Whenever the terms set forth below are used in this Consent Decree, the following definitions shall apply:

a. "Complaint" shall mean the complaint filed by the United States in this action, "Complaint-in-Intervention" shall mean the complaint-in-intervention filed by the State in this action, and "Complaints" shall mean the Complaint and the Complaint-in-Intervention.

b. "Combined Sewer Overflow Discharge" or "CSO Discharge" shall mean any wet weather discharge from any outfall identified as a "Combined Sewer Overflow" in NPDES Permit No. NH0100234.

c. "Combined Sewer Overflow Facility" shall mean overflow control devices and portions of the collection system downstream of such devices.

d. "Consent Decree" or "Decree" shall mean this Consent Decree and all appendices attached hereto.

e. "CSO Policy" shall mean EPA's "Combined Sewer Overflow (CSO) Policy," which was published in the Federal Register on April 19, 1994 (59 Fed Reg. 18688).

f. "Day" shall mean a calendar day unless expressly stated to be a business day. In computing any period of time under this Consent Decree, where the last day would fall

on a Saturday, Sunday, or federal holiday, the period shall run until the close of business of the next business day.

g. "Defendant" or "the City" shall mean the City of Portsmouth, New Hampshire.

h. "EPA" shall mean the United States Environmental Protection Agency and any of its successor departments or agencies.

i. "Effective Date" shall mean the date upon which this Consent Decree is entered by the Court or a motion to enter the Consent Decree is granted, whichever occurs first, as recorded on the Court's docket, pursuant to Section XIII.

j. "Facility" shall mean the City's publicly owned treatment works, treatment plant, all collection systems, the collection tributaries thereto, and all appurtenances to the treatment plant and collection systems, except Combined Sewer Overflow Facilities.

k. "Long-Term Control Plan" or "LTCP" shall mean the plan for all capital and process improvements and additions necessary to bring the Sewer System into compliance with all applicable federal and state laws and regulations with respect to CSO Discharges.

l. "NHDES" shall mean the New Hampshire Department of Environmental Services.

m. "Nine Minimum Controls" shall mean the measures defined in the CSO Policy and presented in the City Nine Minimum Controls Compliance Plan dated January 14, 1997 and as updated by the Wastewater Master Plan. (Appendix A).

n. "Paragraph" shall mean a portion of this Consent Decree identified by an arabic numeral.

- o. "Parties" shall mean the United States, the State, and the City.
- p. "Section" shall mean a portion of this Consent Decree identified by a roman numeral.
- q. "Sewer System" shall mean the pipes, structures, and appurtenances owned and/or operated by the City that collect and convey sewage and stormwater to the wastewater treatment plant, and during wet weather, to the outfalls identified in NPDES Permit No. NH0100234.
- r. "State" shall mean the State of New Hampshire.
- s. "United States" shall mean the United States of America, acting on behalf of EPA.
- t. "Wastewater Master Plan" or "WMP" shall mean the Plan developed to comply with the secondary treatment and CSO abatement requirements in NPDES Permit No. NH0100234. "WMP Scope of Work" or "WMP SOW" shall mean the proposed Scope of Work submitted to EPA on May 17, 2007, including any modifications pursuant to Paragraph 66.
- u. "Wastewater Treatment Facilities" or "WWTF" shall mean the Pierce Island Wastewater Treatment Facility, the Pease Development Authority Wastewater Treatment Facility, any additional secondary treatment plants, as well as all appurtenances, additions, or improvements thereto, including the plant headworks and all facilities downstream of the headworks.

IV. COMPLIANCE REQUIREMENTS

8. Nine Minimum Controls Compliance Plan. Attached as Appendix A is the Nine Minimum Controls Compliance Plan. The City shall implement the Nine Minimum Controls

Compliance Plan in accordance with the schedule specified in Appendix A.

9. Wastewater Master Plan. Attached as Appendix B is the WMP SOW dated May 17, 2007. The City shall implement the WMP in Appendix B, and comply with all milestones and schedules in Appendix B.1.

10. Combined Sewer Overflow Facility Upgrades. The City shall implement its April 2005 Final CSO Long Term Control Plan in accordance with the following schedule and shall complete all construction for implementation of the 2005 LTCP projects listed below by October, 2013:

Planning Area I.D.	Contract I.D.	Project Start Date	Project Completion Date
Lincoln 3	Phase I	In Progress	10/1/2011
Lincoln 3	Phase II	In Progress	10/1/2012
Lincoln 3	Phase III	In Progress	10/1/2013
Court/State	Court #3	1/1/2008	1/1/2012
Islington	Islington #1	Under Design	10/1/2010
Islington	Islington #2	Under Design	1/1/2012

11. Interim Emissions/Effluent Limits. Until the City completes construction of and achieves full operation of secondary treatment facilities in accordance with the schedule contained in this Consent Decree, the City shall comply with the interim limits and measures set forth in Appendix C. (See Current AO effluent limits). Thereafter, the City shall comply with the applicable NPDES permit limits then in effect.

12. Post Construction Monitoring Plan: In conjunction with the City's submittal of the LTCP Update pursuant to Paragraph 9, the City shall submit to EPA for approval a work plan for conducting an ongoing study or series of studies to begin after construction is complete ("Post-Construction Monitoring Plan") to help determine: i) whether the LTCP measures, when completed, meet all design criteria and performance criteria specified in the LTCP; ii) whether

the Combined Sewer Overflow Facility, and the WWTFs with respect to the treatment of combined sewage, comply with the technology-based and water-quality-based requirements of the CWA, the CSO Policy, and all applicable federal and state regulations and permits; and iii) that there are no CSO Discharges.

a. The Post-Construction Monitoring Plan shall contain a schedule for performance of the study or series of studies at key points during the course of the implementation of the measures, as well as after completion of the measures, specified in the LTCP. The Post-Construction Monitoring Plan also shall indicate the years (at least biannually) in which data generated during implementation of the Post-Construction Monitoring Plan will be submitted in reports to EPA.

b. EPA may approve the Post-Construction Monitoring Plan, or may decline to approve it and provide written comments. Within sixty (60) days of receiving EPA's comments, the City shall either: i) alter the Post-Construction Monitoring Plan consistent with EPA's comments and resubmit the Plan to EPA for final approval; or ii) submit the matter for dispute resolution under Section VIII.

c. Upon final approval of the Post Construction Monitoring Plan, the City shall implement, in accordance with the schedule therein, the Post-Construction Monitoring Plan. If the results of the Post-Construction Monitoring Plan indicate areas of non-compliance, the City shall, within sixty days, submit to EPA a Supplemental Compliance Plan which includes the actions that the City will take to achieve compliance and a schedule for taking such actions. Upon approval by EPA, the City shall implement the Supplemental Compliance Plan, in accordance with the schedule specified in the approved Plan.

d. Within one hundred twenty (120) days after complete implementation of the Post-Construction Monitoring Plan, the City shall submit a Final Post-Construction Monitoring Report to EPA for review, comment, and approval, that:

- i) demonstrates that the City performed the Post-Construction Monitoring Plan in accordance with the approved Plan and schedule set forth in the approved Plan; and
- ii) summarizes the data collected pursuant to the Post-Construction Monitoring Plan and analyzes whether the completed control measures have met and/or are meeting the design and performance criteria specified in the LTCP and whether the Combined Sewer Overflow Facility, and the WWTFs with respect to the treatment of combined sewage, comply with the requirements of the CWA, the CSO Policy, and all applicable federal and state regulations and permits.

e. EPA may approve the Final Post-Construction Monitoring Report, or may decline to approve it and provide written comments. Within sixty (60) days of receiving EPA's comments, the City shall either: i) alter the Final Post-Construction Monitoring Report consistent with EPA's comments and resubmit the Report to EPA for final approval; or ii) submit the matter for dispute resolution under Section VIII. Approval of the Final Post-Construction Monitoring Report constitutes only EPA's approval that the report contains the information required by this Paragraph. Such approval does not mean that EPA believes that the City has complied with any other requirement of this Consent Decree or federal or state law.

13. Final Deadline. The City shall complete all requirements in Paragraphs 8 through

10 in accordance with the schedules and deadlines contained therein and in the referenced Appendices.

14. Approval of Deliverables. After review of any plan, report, or other item that is required to be submitted pursuant to this Consent Decree, EPA and the State shall in writing: (a) approve the submission; (b) approve the submission upon specified conditions; (c) approve part of the submission and disapprove the remainder; or (d) disapprove the submission.

15. If the submission is approved pursuant to Paragraph 14 the City shall take all actions required by the plan, report, or other document, in accordance with the schedules and requirements of the plan, report, or other document, as approved. If the submission is conditionally approved or approved only in part, pursuant to Paragraph 14(b) or 14(c), the City shall, upon written direction from EPA and the State, take all actions required by the approved plan, report, or other item that EPA and the State determines are technically severable from any disapproved portions, subject to the City's right to dispute only the specified conditions or the disapproved portions under Section VIII.

16. If the submission is disapproved in whole or in part pursuant to Paragraph 14(c) or 14(d), the City shall, within 45 Days or such other time as the Parties agree to in writing, correct all deficiencies and resubmit the plan, report, or other item, or disapproved portion thereof, for approval, in accordance with the preceding Paragraphs. If the resubmission is approved in whole or in part, the City shall proceed in accordance with the preceding Paragraph.

17. Any stipulated penalties applicable to the original submission, as provided in Section VI, shall accrue during the 45-Day period or other specified period, but shall not be payable unless the resubmission is untimely or is disapproved in whole or in part; provided that,

if the original submission was so deficient as to constitute a material breach of the City's obligations under this Consent Decree, the stipulated penalties applicable to the original submission shall be due and payable notwithstanding any subsequent resubmission.

18. If a resubmitted plan, report, or other item, or portion thereof, is disapproved in whole or in part, EPA and the State may again require the City to correct any deficiencies, in accordance with the preceding Paragraphs, or may themselves correct any deficiencies, subject to the City's right to invoke Dispute Resolution and the right of EPA and the State to seek stipulated penalties as provided in the preceding Paragraph.

19. Where any compliance obligation under this Section requires the City to obtain a federal, state, or local permit or approval, the City shall submit timely and complete applications and take all other actions necessary to obtain all such permits or approvals. The City may seek relief under the provisions of Section VII for any delay in the performance of any such obligation resulting from a failure to obtain, or a delay in obtaining, any permit or approval required to fulfill such obligation if the City has submitted timely and complete applications and has taken all other actions necessary to obtain all such permits or approvals.

V. REPORTING REQUIREMENTS

20. The City shall submit the following reports:

a. Within 30 days after the end of each calendar quarter (i.e., by April 30, July 30, October 30, and January 30) after the Effective Date of this Consent Decree, until termination of this Decree pursuant to Section XVI, the City shall submit a written report for the preceding calendar quarter that shall include a description of the following: i) the status of any construction or compliance measures; ii) the status of all Consent Decree milestones; iii) any

problems encountered or anticipated, together with the proposed or implemented solutions; iv) the status of permit applications; v) operation and maintenance operations; and vi) reports to State agencies.

b. The report also shall include a description of any non-compliance with the requirements of this Consent Decree and an explanation of the violation's likely cause and of the remedial steps taken, or to be taken, to prevent or minimize such violation. If the cause of a violation cannot be fully explained at the time the report is due, the City shall so state in the report. The City shall investigate the cause of the violation and shall then submit an amendment to the report, including a full explanation of the cause of the violation, within 45 Days of the Day the City becomes aware of the cause of the violation. Nothing in this Paragraph or the following Paragraph relieves the City of its obligation to provide the notice required by Section VII. If the City violates, or has reason to believe that it may violate, any requirement of this Consent Decree, the City shall notify the United States and the State of such violation and its likely duration, in writing, within 15 working Days of the Day the City first becomes aware of the violation, with an explanation of the violation's likely cause and of the remedial steps taken, or to be taken, to prevent or minimize such violation.

21. Whenever any violation of this Consent Decree or any other event affecting the City's performance under this Decree, or the performance of the Facility, may pose an immediate threat to the public health or welfare or the environment, the City shall notify EPA and the State orally or by electronic or facsimile transmission as soon as possible, but no later than 24 hours after the City first knew of the violation or event. This procedure is in addition to the requirements set forth in the preceding Paragraph.

22. All reports shall be submitted to the persons designated in Section XII.
23. Each report submitted by the City under this Section shall be signed by an official of the submitting party and include the following certification:

I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

This certification requirement does not apply to emergency or similar notifications where compliance would be impractical.

24. The reporting requirements of this Consent Decree do not relieve the City of any reporting obligations required by the CWA or its implementing regulations, or by any other federal, state, or local law, regulation, permit, or other requirement.

25. Any information provided pursuant to this Consent Decree may be used by the United States in any proceeding to enforce the provisions of this Consent Decree and as otherwise permitted by law.

VI. STIPULATED PENALTIES

26. The City shall be liable to the United States and the State for stipulated penalties for violations of this Consent Decree as specified below, unless excused under Section VII. A violation includes failing to perform any obligation required by the terms of this Consent Decree, including any work plan or schedule approved under this Decree, according to all applicable requirements of this Consent Decree and within the specified time schedules established by or

approved under this Decree.

27. Interim Effluent Limits. The following stipulated penalties shall accrue per violation per Day for each violation of a requirement of Paragraph 11:

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$ 500	1st through 14th Day
\$ 750	15th through 30th Day
\$1,000	31st Day and beyond

28. Compliance Milestones.

a. The following stipulated penalties shall accrue per violation per Day for each violation of the requirements identified in subparagraph 28.b.:

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$ 500	1st through 14th Day
\$ 750	15th through 30th Day
\$1,000	31st Day and beyond

b. Failure to comply with the following milestones, including the submission of any required progress reports (other than those covered by Paragraph 29 below), plans, or other deliverables shall be subject to the penalties set forth in subparagraph (a):

- i. implement the Nine Minimum Controls Compliance Plan pursuant to Paragraph 8;
- ii. implement the Wastewater Management Plan pursuant to Paragraph 9;
- iii. implement the CSO LTCP pursuant to Paragraph 10; and
- iv. implement the Post-Construction Monitoring Plan pursuant to Paragraph 12.

29. Reporting Requirements. The following stipulated penalties shall accrue per

violation per Day for each violation of the reporting requirements of Section V:

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$ 500	1st through 14th Day
\$ 750	15th through 30th Day
\$1,000	31st Day and beyond

30. Stipulated penalties under this Section shall begin to accrue on the Day after performance is due or on the Day a violation occurs, whichever is applicable, and shall continue to accrue until performance is satisfactorily completed or until the violation ceases. Stipulated penalties shall accrue simultaneously for separate violations of this Consent Decree.

31. The City shall pay stipulated penalties to the United States and the State within 10 Days of a written demand by either Plaintiff. The City shall pay 50 percent of the total stipulated penalty amount due to the United States and 50 percent to the State. The Plaintiff making a demand for payment of a stipulated penalty shall simultaneously send a copy of the demand to the other Plaintiff.

32. The United States may, in the unreviewable exercise of its discretion, reduce or waive stipulated penalties otherwise due under this Consent Decree.

33. Stipulated penalties shall continue to accrue during any period of Dispute Resolution, but need not be paid until the following:

a. If the dispute is resolved by agreement or by a decision of EPA that is not appealed to the Court, the City shall pay accrued penalties determined to be owing, together with interest, within 30 Days of the effective date of the agreement or the receipt of EPA's decision or order.

b. If the dispute is appealed to the Court and the United States prevails in whole or in part, the City shall pay all accrued penalties determined by the Court to be owing,

together with interest, within 60 Days of receiving the Court's decision or order, except as provided in subparagraph c, below.

c. If any Party appeals the District Court's decision, the City shall pay all accrued penalties determined to be owing, together with interest, within 15 Days of receiving the final appellate court decision.

34. The City shall pay stipulated penalties owing to the United States by FedWire Electronic Funds Transfer ("EFT") to the U.S. Department of Justice in accordance with written instructions to be provided to the City, following lodging of the Consent Decree, by the Financial Litigation Unit of the U.S. Attorney's Office for the District of New Hampshire, 53 Pleasant St., Concord, NH, 03301. At the time of payment, the City shall send a copy of the EFT authorization form and the EFT transaction record, together with a transmittal letter, which shall state that the payment is for stipulated penalties owed pursuant to the Consent Decree in United States v. City of Portsmouth, New Hampshire, shall state the violations for which the stipulated penalties are due, and shall reference the civil action number and DOJ case number 90-5-1-1-09308, to the United States in accordance with Section XII; by email to acctsreceivable.CINWD@epa.gov; and by mail to:

EPA Cincinnati Finance Office
26 Martin Luther King Drive
Cincinnati, Ohio 45268

The City shall pay stipulated penalties owing to the State shall be made by certified or cashier's check payable to the "Treasurer, State of New Hampshire" and shall be delivered to the Department of Justice, Environmental Protection Bureau, 33 Capitol Street, Concord, New Hampshire, 03301, Attn: Allen Brooks, Esq. Payments shall be accompanied by a reference to

this Consent Decree. Payments shall be made within seven days of receipt of written demand. If the City fails to pay stipulated penalties according to the terms of this Consent Decree, the City shall be liable for interest on such penalties, as provided for in 28U.S.C. §1961, accruing as of the date payment became due. Nothing in this Paragraph shall be construed to limit the United States or the State from seeking any remedy otherwise provided by law for the City's failure to pay any stipulated penalties.

35. Subject to the provisions of Section X, the stipulated penalties provided for in this Consent Decree shall be in addition to any other rights, remedies, or sanctions available to the United States for the City's violation of this Consent Decree or applicable law. The City expressly reserves any and all legal and equitable defenses that may be available to it with respect to such claims. Where a violation of this Consent Decree is also a violation of the CWA, the City shall be allowed a credit for any stipulated penalties paid against any statutory penalties imposed for such violation.

VII. FORCE MAJEURE

36. Force majeure," for purposes of this Consent Decree, is defined as any event arising from causes beyond the control of the City, of any entity controlled by the City, or of the City's contractors that delays or prevents the timely performance of any obligation under this Consent Decree despite the City's best efforts to fulfill the obligation. The requirement that the City exercise "best efforts to fulfill the obligation " includes using best efforts to anticipate any potential force majeure event and best efforts to address the effects of any such event i) as it is occurring, and ii) after it has occurred to prevent or minimize any resulting delay to the greatest extent possible. "Force Majeure" does not include the City's financial inability to perform any

obligation under this Consent Decree.

37. If any event occurs or has occurred that may delay the performance of any obligation under this Consent Decree, whether or not caused by a force majeure event, the City shall provide notice orally or by electronic or facsimile transmission to Joy Hilton of EPA, Region I within 72 hours of when the City first knew that the event might cause a delay. Within ten days thereafter, the City shall provide in writing to EPA and the State: an explanation and description of the reasons for the delay; the anticipated duration of the delay; all actions taken or to be taken to prevent or minimize the delay; a schedule for implementation of any measures to be taken to prevent or mitigate the delay or the effect of the delay; the City's rationale for attributing such delay to a force majeure event if it intends to assert such a claim; and a statement as to whether, in the opinion of the City, such event may cause or contribute to an endangerment to public health, welfare, or the environment. The City shall include with any notice all available documentation supporting the claim that the delay was attributable to a force majeure. Failure to comply with the above requirements shall preclude the City from asserting any claim of force majeure for that event for the period of time of such failure to comply and for any additional delay caused by such failure. The City shall be deemed to know of any circumstances of which the City, any entity controlled by the City, or the City's contractors knew or should have known.

38. If EPA, after a reasonable opportunity for review and comment by the State, agrees that the delay or anticipated delay is attributable to a force majeure event, the time for performance of the obligations under this Consent Decree that are affected by the force majeure event will be extended by EPA, after a reasonable opportunity for review and comment by the State, for such time as is necessary to complete those obligations and no stipulated penalties shall

be due for the extension period. An extension of the time for performance of the obligations affected by the force majeure event shall not, of itself, extend the time for performance of any other obligation. EPA will notify the City in writing of the length of the extension, if any, for performance of the obligations affected by the force majeure event.

39. If EPA, after a reasonable opportunity for review and comment by the State, does not agree that the delay or anticipated delay has been or will be caused by a force majeure event, EPA will notify the City in writing of its decision.

40. If the City elects to invoke the dispute resolution procedures set forth in Section VIII, it shall do so by sending the United States a written Notice of Dispute no later than 15 days after receipt of EPA's notice. In any such proceeding, the City shall have the burden of demonstrating by a preponderance of the evidence that the non-compliance, delay or anticipated delay has been or will be caused by a force majeure event, that the duration of the delay or the extension sought was or will be warranted under the circumstances, that best efforts were exercised to avoid and mitigate the effects of the delay, and that the City complied with the requirements of Paragraphs 37 and 38, above. If the City carries this burden, the delay at issue shall be deemed not to be a violation by the City of the affected obligation of this Consent Decree identified to EPA and the Court.

VIII. DISPUTE RESOLUTION

41. Unless otherwise expressly provided for in this Consent Decree, the dispute resolution procedures of this Section shall be the exclusive mechanism to resolve disputes arising under or with respect to this Consent Decree. The City's failure to seek resolution of a dispute under this Section shall preclude the City from raising any such issue as a defense to an action by

the United States to enforce any obligation of the City arising under this Consent Decree.

42. Informal Dispute Resolution. Any dispute subject to Dispute Resolution under this Consent Decree shall first be the subject of informal negotiations. The dispute shall be considered to have arisen when the City sends the United States a written Notice of Dispute. Such Notice of Dispute shall state clearly the matter in dispute. The period of informal negotiations shall not exceed 30 Days from the date the dispute arises, unless that period is modified by written agreement. If the Parties cannot resolve a dispute by informal negotiations, then the position advanced by the United States shall be considered binding unless, within 30 Days after the conclusion of the informal negotiation period, the City invokes formal dispute resolution procedures as set forth below.

43. Formal Dispute Resolution. The City shall invoke formal dispute resolution procedures, within the time period provided in the preceding Paragraph, by serving on the United States a written Statement of Position regarding the matter in dispute. The Statement of Position shall include, but need not be limited to, any factual data, analysis, or opinion supporting the City's position and any supporting documentation relied upon by the City.

44. The United States shall serve its Statement of Position within 30 Days of receipt of the City's Statement of Position. The United States' Statement of Position shall include, but need not be limited to, any factual data, analysis, or opinion supporting that position and any supporting documentation relied upon by the United States. The United States' Statement of Position shall be binding on the City, unless the City files a motion for judicial review of the dispute in accordance with the following Paragraph. The formal dispute resolution period shall not exceed 30 days unless a longer period is agreed to by the parties in writing.

45. The City may seek judicial review of the dispute by filing with the Court and serving on the United States, in accordance with Section XII, a motion requesting judicial resolution of the dispute. The motion must be filed within 20 Days of receipt of the United States' position pursuant to the preceding Paragraph. The motion shall contain a written statement of the City's position on the matter in dispute, including any supporting factual data, analysis, opinion, or documentation, and shall set forth the relief requested and any schedule within which the dispute must be resolved for orderly implementation of the Consent Decree.

46. The United States shall respond to the City's motion within the time period allowed by the Local Rules of this Court. The City may file a reply memorandum, to the extent permitted by the Local Rules.

47. Standard Review.

a. Disputes Concerning Matters Accorded Record Review. Except as otherwise provided in this Consent Decree, in any dispute brought under Paragraph 46 pertaining to the adequacy or appropriateness of plans, procedures to implement plans, schedules, or any other items requiring approval by EPA under this Consent Decree, the adequacy of the performance of work undertaken pursuant to this Consent Decree, and all other disputes that are accorded review on the administrative record under applicable principles of administrative law, the City shall have the burden of demonstrating, based on the administrative record, that the position of the United States is arbitrary and capricious or otherwise not in accordance with law.

b. Other Disputes. Except as otherwise provided in this Consent Decree, in any other dispute brought under Section VIII, the City shall bear the burden of demonstrating that its position complies with this Consent Decree.

48. The invocation of dispute resolution procedures under this Section shall not, by itself, extend, postpone, or affect in any way any obligation of the City under this Consent Decree, unless and until final resolution of the dispute so provides. Stipulated penalties with respect to the disputed matter shall continue to accrue from the first Day of noncompliance, but payment shall be stayed pending resolution of the dispute as provided in Paragraph 33. If the City does not prevail on the disputed issue, stipulated penalties shall be assessed and paid as provided in Section VI.

IX. INFORMATION COLLECTION AND RETENTION

49. The United States, the State, and their representatives, including attorneys, contractors, and consultants, shall have the right of entry into the Facility at all reasonable times, upon presentation of credentials, to:

- a. monitor the progress of activities required under this Consent Decree;
- b. verify any data or information submitted to the United States or the State in accordance with the terms of this Consent Decree;
- c. obtain samples and, upon request, splits of any samples taken by the City or its representatives, contractors, or consultants;
- d. obtain documentary evidence, including photographs and similar data; and
- e. assess the City's compliance with this Consent Decree.

50. Upon request, the City shall provide EPA and the State or their authorized representatives splits of any samples taken by the City. Upon request, EPA and the State shall provide the City splits of any samples taken by EPA or the State.

51. Until five years after the termination of this Consent Decree, the City shall retain,

and shall instruct its contractors and agents to preserve, all non-identical copies of all documents, records, or other information (including documents, records, or other information in electronic form) in its or its contractors' or agents' possession or control, or that come into its or its contractors' or agents' possession or control, that relate in any manner to the City's performance of its obligations under this Consent Decree. This information-retention requirement shall apply regardless of any contrary corporate or institutional policies or procedures. At any time during this information-retention period, upon request by the United States or the State, the City shall provide copies of any documents, records, or other information required to be maintained under this Paragraph. At the conclusion of the information-retention period provided in this Paragraph, the City shall notify the United States and the State at least 90 Days prior to the destruction of any documents, records, or other information subject to the requirements of this Paragraph and, upon request by the United States or the State, the City shall deliver any such documents, records, or other information to EPA or the State. The City may assert that certain documents, records, or other information is privileged under the attorney-client privilege or any other privilege recognized by federal law. If the City asserts such a privilege, it shall provide the following: i) the title of the document, record, or information; ii) the date of the document, record, or information; iii) the name and title of each author of the document, record, or information; iv) the name and title of each addressee and recipient of the document, record, or information; v) a description of the subject of the document, record, or information; and vi) the privilege asserted by the City. However, no documents, records, or other information created or generated pursuant to the requirements of this Consent Decree shall be withheld on grounds of privilege.

52. The City may also assert that information required to be provided under this Section is protected as Confidential Business Information ("CBI") under 40 C.F.R. Part 2. As to any information that the City seeks to protect as CBI, the City shall follow the procedures set forth in 40 C.F.R. Part 2.

53. This Consent Decree in no way limits or affects any right of entry and inspection, or any right to obtain information, held by the United States or the State pursuant to applicable federal or state laws, regulations, or permits, nor does it limit or affect any duty or obligation of the City to maintain documents, records, or other information imposed by applicable federal or state laws, regulations, or permits.

X. EFFECT OF SETTLEMENT/RESERVATION OF RIGHTS

54. This Consent Decree resolves the civil claims of the United States and the State for the violations alleged in the Complaints filed in this action through the date of lodging.

55. The United States and the State reserve all legal and equitable remedies available to enforce the provisions of this Consent Decree, except as expressly stated in Paragraph 54. This Consent Decree shall not be construed to limit the rights of the United States or the State to obtain penalties or injunctive relief under the Act or implementing regulations, or under other federal or state laws, regulations, or permit conditions, except as expressly specified in Paragraph

54. The United States and the State further reserve all legal and equitable remedies to address any imminent and substantial endangerment to the public health or welfare or the environment arising at, or posed by, the Facility, whether related to the violations addressed in this Consent Decree or otherwise.

56. In any subsequent administrative or judicial proceeding initiated by the United

States or the State for injunctive relief, civil penalties, or other appropriate relief relating to the Facility or the City's violations, the City shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, res judicata, collateral estoppel, issue preclusion, claim preclusion, claim-splitting, or other defenses based upon any contention that the claims raised by the United States or the State in the subsequent proceeding were or should have been brought in the instant case, except with respect to claims that have been specifically resolved pursuant to Paragraph 54 of this Section.

57. This Consent Decree is not a permit, or a modification of any permit, under any federal, State, or local laws or regulations. The City is responsible for achieving and maintaining complete compliance with all applicable federal, State, and local laws, regulations, and permits, and the City's compliance with this Consent Decree shall be no defense to any action commenced pursuant to any such laws, regulations, or permits, except as set forth herein. The United States and the State do not, by their consent to the entry of this Consent Decree, warrant or aver in any manner that the City's compliance with any aspect of this Consent Decree will result in compliance with provisions of the CWA, 33 U.S.C. §1251, et seq., or with any other provisions of federal, State, or local laws, regulations, or permits.

58. This Consent Decree does not limit or affect the rights of the City or of the United States or the State against any third parties not party to this Consent Decree, nor does it limit the rights of third parties not party to this Consent Decree against the City, except as otherwise provided by law.

59. This Consent Decree shall not be construed to create rights in, or grant any cause of action to, any third party not party to this Consent Decree.

XI. COSTS

60. The Parties shall bear their own costs of this action, including attorneys' fees, except that the United States and the State shall be entitled to collect the costs (including attorneys' fees) incurred in any action necessary to collect any portion of the civil penalty or any stipulated penalties due but not paid by the City.

XII. NOTICES

61. Unless otherwise specified herein, whenever notifications, submissions, or communications are required by this Consent Decree, they shall be made in writing and addressed as follows:

To the United States:

Mark Pollins
Director of Water Enforcement
U.S. Environmental Protection Agency
USEPA Ariel Rios Building (AR)
1200 Pennsylvania Avenue N.W.
Washington, DC 20004

and

Chief, Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice
Box 7611 Ben Franklin Station
Washington, DC 20044-7611
Re: DOJ No. 90-5-1-1-09308

and

Joy Hilton (SEW)
U.S. Environmental Protection Agency, Region 1
One Congress Street
Boston, MA 02114

To the State:

Tracy L. Wood, P.E.
NHDES Wastewater Engineering Bureau
29 Hazen Drive, P.O. Box 95
Concord, NH 03302-0095

And

Allen Brooks, Esq.
Department of Justice, Environmental Protection Bureau
33 Capitol Street
Concord, NH 03301

To the City:

City Engineer
City of Portsmouth
680 Peverly Hill Road
Portsmouth, NH 03801

And

City Attorney
City of Portsmouth
1 Junkins Avenue
Portsmouth, NH 03801

62. Any Party may, by written notice to the other Parties, change its designated notice recipient or notice address provided above.

63. Notices submitted pursuant to this Section shall be deemed submitted upon mailing, unless otherwise provided in this Consent Decree or by mutual agreement of the Parties in writing.

XIII. EFFECTIVE DATE

64. The Effective Date of this Consent Decree shall be the date upon which this Consent Decree is entered by the Court or a motion to enter the Consent Decree is granted, whichever occurs first, as recorded on the Court's docket; provided, however, that the City

hereby agrees that it shall be bound to perform duties scheduled to occur prior to the Effective Date. In the event the United States withdraws or withholds consent to this Consent Decree before entry, or the Court declines to enter the Consent Decree, then the preceding requirement to perform duties scheduled to occur before the Effective Date shall terminate.

XIV. RETENTION OF JURISDICTION

65. The Court shall retain jurisdiction over this case until termination of this Consent Decree for the purpose of resolving disputes arising under this Decree or entering orders modifying this Decree, pursuant to Sections VIII and XV, or effectuating or enforcing compliance with the terms of this Decree.

XV. MODIFICATION

66. The terms of this Consent Decree, including any attached appendices, may be modified only by a subsequent written agreement signed by all the Parties. Where the modification constitutes a material change to this Consent Decree, it shall be effective only upon approval by the Court.

67. Any disputes concerning modification of this Consent Decree shall be resolved pursuant to Section VIII; provided, however, that instead of the burden of proof provided by Paragraph 48(b), the Party seeking the modification bears the burden of demonstrating that it is entitled to the requested modification in accordance with the grounds for relief specified in Federal Rule of Civil Procedure 60(b).

VI. TERMINATION

68. After the City has completed the requirements of Section V, has thereafter maintained continuous compliance with this Consent Decree and any applicable permit(s) for a period of one year, and has paid any accrued stipulated penalties as required by this Consent Decree, the City may serve upon the United States and the State a Request for Termination, together with all necessary supporting documentation, stating that the City has satisfied those requirements.

69. Following receipt by the United States and the State of the City's Request for Termination, the Parties shall confer informally concerning the Request and any disagreement that the Parties may have as to whether the City has satisfactorily complied with the requirements for termination of this Consent Decree. If the United States, after consultation with the State, agrees that the Consent Decree may be terminated, the Parties shall submit, for the Court's approval, a joint stipulation terminating the Decree.

70. If the United States, after consultation with the State, does not agree that the Consent Decree may be terminated, the City may invoke Dispute Resolution under Section VIII. However, the City shall not seek Dispute Resolution of any dispute regarding termination until 60 days after service of its Request for Termination.

XVII. PUBLIC PARTICIPATION

71. This Consent Decree shall be lodged with the Court for a period of not less than 30 Days for public notice and comment in accordance with 28 C.F.R. §_50.7. The United States reserves the right to withdraw or withhold its consent if the comments regarding the Consent Decree disclose facts or considerations indicating that the Consent Decree is inappropriate,

improper, or inadequate. The City consents to entry of this Consent Decree without further notice and agrees not to withdraw from or oppose entry of this Consent Decree by the Court or to challenge any provision of the Decree, unless the United States has notified the City in writing that it no longer supports entry of the Decree.

XVIII. SIGNATORIES/SERVICE

72. Each undersigned representative of the City, the State, and the Assistant Attorney General for the Environment and Natural Resources Division of the Department of Justice certifies that he or she is fully authorized to enter into the terms and conditions of this Consent Decree and to execute and legally bind the Party he or she represents to this document.

73. This Consent Decree may be signed in counterparts, and its validity shall not be challenged on that basis. The City agrees to accept service of process by mail with respect to all matters arising under or relating to this Consent Decree and to waive the formal service requirements set forth in Rules 4 and 5 of the Federal Rules of Civil Procedure and any applicable Local Rules of this Court, including, but not limited to, service of a summons.

XIX. INTEGRATION

74. This Consent Decree constitutes the final, complete, and exclusive agreement and understanding among the Parties with respect to the settlement embodied in the Decree and supercedes all prior agreements and understandings, whether oral or written, concerning the settlement embodied herein. Other than deliverables that are subsequently submitted and approved pursuant to this Consent Decree, no other document, nor any representation, inducement, agreement, understanding, or promise, constitutes any part of this Decree or the settlement it represents, nor shall it be used in construing the terms of this Decree.

XX. APPENDICES

75. The following appendices are attached to and are part of this Consent Decree:

Appendix A: Nine Minimum Controls Compliance Plan

Appendix B: Wastewater Master Plan Scope of Work

Appendix B.1: Milestones and Schedules

Appendix C: Interim Emissions/Effluent Limits

XXI. FINAL JUDGMENT

76. Upon approval and entry of this Consent Decree by the Court, this Consent Decree shall constitute a final judgment of the Court as to the United States, the State, and the City.

Dated and entered this _____ day of _____, 2009.

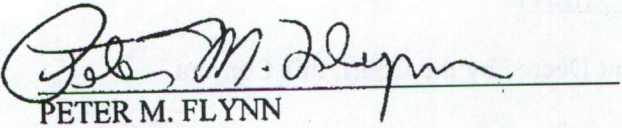
UNITED STATES DISTRICT JUDGE
District of New Hampshire

FOR PLAINTIFF THE UNITED STATES OF AMERICA:



JOHN C. CRUDEN

Acting Assistant Attorney General
Environment and Natural Resources Division
United States Department of Justice



PETER M. FLYNN

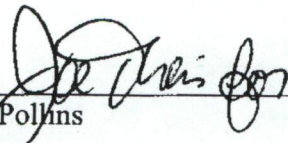
Senior Attorney
Environmental Enforcement Section
United States Department of Justice
P.O. Box 7611
Washington, D.C. 20044-7611
(202) 514-4352
peter.flynn@usdoj.gov

8/17/09
DATE

JOHN P. KACAVAS
United States Attorney
District of New Hampshire

T. David Plourde
Assistant United States Attorney
NH Bar Number 2044
53 Pleasant Street, 4th Floor
Concord, NH 03301-3904
(603) 225-1552
(603) 225-1470 (fax)
david.plourde@usdoj.gov

For the UNITED STATES ENVIRONMENTAL PROTECTION AGENCY



Mark Pollins
Director

8/12/09

DATE

Water Enforcement Division
Office of Enforcement and Compliance Assurance
United States Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

For the UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, REGION I

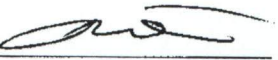
Susan Studlien
Susan Studlien
Director, Office of Environmental Stewardship
United States Environmental Protection Agency,
Region I
One Congress Street – Suite 1100
Boston, Massachusetts 02114
studlien.susan@epa.gov

08/11/09
DATE

For Plaintiff, the State of New Hampshire

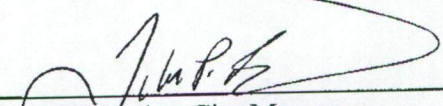
State of New Hampshire
Department of Environmental Services

By its attorneys,
Orville B. Fitch II
Deputy Attorney General
Acting Attorney General

By:  8/7/09
Lauren J. Noether, NH Bar 1881
Senior Assistant Attorney General
Environmental Protection Bureau
33 Capitol Street
Concord, NH 03301
603/271-3679

For Defendant, the City of Portsmouth, New Hampshire

By: _____


John P. Bohenko, City Manager
Pursuant to vote of the City Council
of August 3, 2009.

8-7-09

APPENDIX A

Nine Minimum Controls Compliance Plan

1/9/97

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1/9/97

SECTION 1

INTRODUCTION

The City of Portsmouth owns and operates approximately 115 miles of sewer. The older portions are combined storm water and sanitary sewers. The collection system is separated into two major service areas, the northwestern section and southeastern section. Wastewater from both these sections flow to the Mechanic Street pump station where it is pumped to the City's 4.8 million gallon per day advanced primary treatment plant located on Pierce Island. Treated wastewater is then discharged to the Piscataqua River.

The original collection system had multiple CSO structures. During the 1980s all except two CSOs were eliminated. The two remaining CSOs, 010A and 010B, are located within the southeastern section of the City's collection system on Parrott Avenue and discharge to the South Mill Pond.

In 1990, the City entered into a Consent Decree (Civil No. 89-234-S) with the United States Environmental Protection Agency (USEPA) and the State of New Hampshire because of violations to the City's NPDES permit. In compliance with the Consent Decree, the City of Portsmouth completed a CSO Abatement Program in January 1991. This program recommended a number of projects and Best Management Practices the City should take to address their CSOs. The main recommendation of this Abatement Program was to install a swirl concentrator to provide primary treatment to the remaining CSOs that discharge into the South Mill Pond. The Abatement Program is currently being reviewed by the USEPA for approval.

The City of Portsmouth has identified CSO abatement as a Level I funding priority and has scheduled an update to their CSO Abatement Program for fiscal year 1997 -1998. This update will review the past five years of CSO and rain data to verify the original abatement recommendations are still valid. Since the original Abatement Program was submitted, the City has completed capital upgrades to their Mechanic Street pump station which have reduced the volume and duration of CSO events. The City's current CSO abatement program is scheduled in two phases. The first phase is an engineering study to update the CSO Abatement Program. The Second Phase is to design and construct the selected CSO abatement solution.

The City has packaged the CSO Abatement Program Update with a number of capital improvement projects to take advantage of low interest loans available through the State Revolving Funds (SRF) program and grant money available through the State Aid Grant program (SAG). This \$5.2 million Sewer Improvements Program includes a number of projects that will help further reduce the amount and frequency of CSO events. A copy of the approved SRF application is in Appendix A. The projects directly related to the CSOs include:

Update the "Combined Sewer Overflow Abatement Program" - Update the "Combined Sewer Overflow Abatement Program", dated January 1991 prepared by Whitman and Howard. The updated program will be based on additional flow information collected since the Mechanic Street and Deer Street pump stations have been upgraded. This update will review the combined sewer overflow (CSO) flows and verify the best abatement method. See Work Plan Proposal for

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"Combined Sewer Overflow Abatement Program and 201 Facilities Plan Update" dated July 30, 1996 attached in Appendix B.

201 Facilities Plan - The 201 Facilities Plan will update the 1977 plan prepared by Wright - Pierce. This update will determine the limiting factors within the collection system and treatment plant in order minimize the volume and occurrence of CSO events by maximizing the flow to the treatment plant. The updated 201 Facilities Plan will also allow the City to better project future capital requirements. See Work Plan Proposal for the "Combined Sewer Overflow Abatement Program and 201 Facilities Plan Update" prepared by Underwood Engineers dated July 30, 1996 attached in Appendix B.

CSO Abatement Project Design - This project will prepare plans and specifications for the construction of the best abatement process once it has been selected.

Collection System Monitoring Program - Installation of remote monitoring at the City's 17 pump stations via a telemetry system. Remote monitoring will allow continuous monitoring of the City's 17 pump station to better manage the collection system.

Collection System Equipment Replacement - Much of the City's collection system equipment has reached the end of their useful life and require replacement. This includes equipment that is used to maintain the combined sewer system (CSS) including:

- Vactor Truck
- Sewer Cleaner
- Trash Pumps
- Rack Body Truck
- Dump Truck
- Backhoe/Loader
- Sewer Monitoring Truck
- Pickup Truck
- Sewer Collection Video Camera

24 - Inch Force Main Replacement - Replace 300 feet of 16 - inch force main under the Pierce Island bridge with 24 - inch force main. The existing 16 - inch force main has required a number of repairs due its deteriorated condition and is need replacement. Twenty four inch pipe will provide additional capacity and reduce head requirements.

Borthwick Avenue Sewer Replacement - Approximately 2,000 feet of interceptor on Borthwick Avenue is seriously degraded and is contributing I/I to the collection system. This project will replace the deteriorated line to minimize the excess flow.

Combined Sewer Rehabilitation, Bartlett Street to Market Street - This section of interceptor is seriously degraded and is contributing I/I to the collection system. This project will replace the deteriorate line to minimize the excess flow.

This document is intended to fulfill documentation requirements for the Nine Minimum Controls outlined by the USEPA in their 1994 CSO policy clarification. These Nine Minimum Controls are:

1/9/97

1. Proper operation and regular maintenance programs for the sewer system and CSO outfalls.
2. Maximum use of the collection system for storage.
3. Review and modification of pretreatment requirements to ensure that CSO impacts are minimized.
4. Maximization of flow to the City's wastewater treatment plant.
5. Elimination of CSOs during dry weather.
6. Control of solid and floatable materials in CSOs.
7. Pollution prevention programs to reduce contaminants in CSOs.
8. Public notification to ensure that the public receives adequate notification of CSO occurrences and CSO impacts.
9. Monitoring to effectively characterize CSO impacts and the efficacy of CSO controls.

1/9/97

SECTION 2

PROPER OPERATION AND REGULAR MAINTENANCE PROGRAMS FOR THE SEWER SYSTEM AND CSO OUTFALLS

The first minimum control, proper operation and regular maintenance program, ensures that a CSS and treatment facility functions to maximize the flow that is conveyed to the treatment plant or is stored within the collection system before a CSO occurs. The City complies with this minimum control through its collection system maintenance program. As part of the 1991 CSO Abatement Program prepared by Whitman and Howard, additional maintenance and operation procedures were identified. The City has implemented an informal inspection program of its collection system to identify problem areas that could possibly restrict the use of the systems storage capacity. As part of the scheduled 201 Facilities Plan Update, the City will review their CSS maintenance procedures. An outline of their informal program is included in Appendix C. The program consists of:

The organizations and people responsible for various aspects of the O&M program.

The resources (i.e. people and dollars) allocated to O&M activities.

Planning and budgeting procedures for O&M of the CSS and treatment facilities. A list of facilities critical to the performance of the CSS maintenance.

Written procedures and schedules for routine, periodic maintenance of major items of equipment and CSO diversion facilities listed previously.

A process for periodic inspections of the facilities listed previously.

Written procedures, including procurement procedures, for responding to emergency situations. The City has an emergency purchasing procedure which allows for repair of equipment associated with the CSOs. A copy of these procedures and purchase order form is included in Appendix D.

As part of an on going review, the City is investigating changing the job descriptions of collection system personnel. This change will require a minimum of certification of Grade I Operator.

1/9/97

SECTION 3

MAXIMUM USE OF THE COLLECTION SYSTEM FOR STORAGE

As part of the 1991 CSO Abatement Program prepared by Whitman and Howard a hydraulic evaluation of the CSS associated with the remaining two CSOs was performed. This evaluation determined that the section of CSS connected to the CSOs was hydraulically limited with little storage capacity available. Further inspection of the collection system showed that increasing the capacity of the Mechanic Street pump station would help reduce the capacity problem. The City is in the process of compiling a formal maintenance and inspection program of its collection system to identify problem areas that could possibly restrict the use of the systems storage capacity. This program is being incorporated into the City's digitized GIS mapping system. In addition, during the 201 facilities program, the City will review their CSS maintenance procedures. Their non - written procedures include:

- Regular maintenance of CSO monitoring equipment.
- Tide gate maintenance and repair quarterly or as needed.
- Adjustment of regulator settings quarterly.
- As part of their regular collection system repair and replacement procedures the City eliminates infiltration and inflow when possible. In addition, the City's site review procedure requires new developments to upgrade the collection system to reduced inflow and infiltration based on the impact of the new development's wastewater flows.
- Requiring localized upstream detention for any new development that will affect downstream run off.
- The City has upgraded their Mechanic Street pump station to help reduce CSOs. The upgrade increased the pump station's capacity from 10.66 to 22.00 mgd. This upgrade was estimated by Moffa and Associates Consulting Engineers to have reduced CSO volume and occurrence by approximately 60%. Additional review of the CSO data and hydraulics will be performed as part of the CSO on of Pump Operations at Interceptor Lift Stations.
- The City has installed additional manholes to improve access to long stretches of CSS. These new manholes have allowed access to clean CSSs to remove obstructions that impede flow.

1/9/97

SECTION 4

REVIEW AND MODIFICATION OF PRETREATMENT REQUIREMENTS TO ENSURE THAT CSO IMPACTS ARE MINIMIZED

Objective of this control is to minimize the impacts of discharges into CSSs from non-domestic sources during wet weather events, and to minimize CSO occurrences by modifying inspection, reporting and oversight procedures within the approved pretreatment program. To minimize non-domestic impacts to CSOs, the City complies with the State of New Hampshire's pretreatment requirements. In addition, the City's site review requirements for new developments include erosion and sedimentation controls, three foot sumps on all new catch basins, and grit and oil separators for applicable facilities. During the CSO Abatement Program Update City's pretreatment program will be reviewed and recommendations to improve it will be made, if necessary.

1/9/97

SECTION 5

MAXIMIZATION OF FLOW TO THE CITY'S WASTEWATER TREATMENT PLANT

Through its regular maintenance program the City has worked to maximize the capacity of its collection system. In addition to maintenance, the City has performed a number of capital improvement projects that have increased the capacity of the Mechanic Street pump station which pumps all the flow collected in the City to the Pierce Island plant. This upgrade increased the pump station's capacity from 10.66 mgd to 22 mgd which was estimated by Moffa and Associates Consulting Engineers to have reduced CSO volume and occurrence by approximately 60%. The CSO Abatement Program Update proposed by the City will review CSO flow and duration records and will revisit the hydraulics of the section of CSS directly linked to the CSO structures.

As part of their \$5.2 million Sewerage Improvements Program the City is updating their 201 Facilities plan. This update will evaluate the capacity of the existing plant to determine available capacity and how to maximize flow to the plant. The Facilities Plan update will estimate costs for any physical modifications and increased O&M costs for modifications to the plant to handle wet weather flows.

The 201 Facilities Plan Update will also determine capacity of major interceptors and pumping stations and their ability to deliver flow to the plant, identify additional maintenance that will help ensure full capacity is available. The Update will analyze existing records to compare flows processed by the plant during wet weather events and dry periods to determine the relationship between flow and performance.

1/9/97

SECTION 6

ELIMINATION OF CSOS DURING DRY WEATHER

Dry weather overflows were eliminated by modifications to the City's two remaining overflow structures. These modification included addition of stop logs to raise the required hydraulic grade necessary for flows to by-pass. Based on previous studies and data collected from continuous monitoring of the CSOs, there are currently no dry weather overflow events. Daily monitoring reports are sent to the State monthly. An example of the CSO monitoring data is shown in Appendix E.

1/9/97

SECTION 7

CONTROL OF SOLID AND FLOATABLE MATERIALS IN CSOS

The City controls solids and floatable through their regular street sweeping program, park maintenance, and leaf removal program. The maintenance programs associated with the CSOs will be reviewed and their effectiveness evaluated during the CSO Abatement Program Update.

In its on going effort to control solids and floatable materials from entering the CSS, the City has included the purchase of CSS maintenance equipment as part of the \$5.2 million Sewerage Improvements Program. This equipment includes a new vacuor truck, sewer cleaner, and a sewer collection video camera. This equipment will be used to help in the City's effort to minimize solids and floatable materials from being discharged during CSO events.

1/9/97

SECTION 8

POLLUTION PREVENTION PROGRAMS TO REDUCE CONTAMINANTS IN CSOS

The seventh minimum control is intended to help prevent pollution from entering the CSS and the receiving water through the CSO. The strategies required to meet this minimum control involve activities such as street cleaning, public education programs, solid waste collection and recycling to minimize the amount of pollution entering into the CSS. As previously discussed in Section 7, the City has enacted a regular street sweeping program. The City also provides public trash cans to help reduce the amount of litter entering into the CSS. As part of their public education efforts the City includes educational materials in its water and sewer bills. The City also holds two household hazardous waste collection days each year. One in the Spring and one in the Fall. These events allow homeowners to dispose of various common household contaminants by bringing those items to the public works department. The products are identified, packed and disposed of by a licensed hazardous waste disposal firm. An example of the sewer educational and the household hazardous waste cleanup day educational material are shown in Appendix F.

The adequacy of the City's pollution control efforts will be reviewed as part of the CSO Abatement Program Update.

1/9/97

SECTION 9

PUBLIC NOTIFICATION TO ENSURE THAT THE PUBLIC RECEIVES ADEQUATE NOTIFICATION OF CSO OCCURRENCES AND CSO IMPACTS

Currently the City has no official notification procedure. As part of the CSO Abatement Program Update, adequacy of the City's current efforts will be reviewed and policies developed to address this requirement will be proposed if necessary.

1/9/97

SECTION 10

MONITORING TO EFFECTIVELY CHARACTERIZE CSO IMPACTS AND THE EFFICIENCY OF CSO CONTROLS

Through continuous monitoring of their two remaining CSOs the City has developed a significant data base to help evaluate the effectiveness of the CSO control steps taken to date. The City currently monitors discharge flow from the two CSOs along with data in the associated interceptor. Rain data is also collected automatically. The data is digitally collected and reviewed monthly. This data has been submitted to the State with the City's monthly daily monitoring reports for the last five years. The previous CSO Abatement Program performed for the City by Whitman and Howard was based on a limited data set. Since that report was completed, capital improvement have been made and an additional six years of data has been collected. Before additional capital projects are pursued the City is going to update their CSO program. This update will revisit the conclusions of the previous report and determine the most cost effective way to control their CSOs.

In addition, the 210 Facilities Plan Update will review the effectiveness of efforts made thus far to reduce inflow and infiltration (I/I) throughout the City's collection system and will recommend steps reduce I/I further.

APPENDIX B

Wastewater Master Plan Scope of Work

City of Portsmouth, NH Wastewater Master Plan

Work Plan

Prepared by: Weston & Sampson, Inc. / Brown and Caldwell

The City of Portsmouth has undertaken this Wastewater Master Plan (WMP) in response to the denial of the 301(h) waiver from secondary treatment at the Peirce Island Wastewater Treatment Facility (WWTF). The denial of this waiver necessitates the revisiting of the City's long-term comprehensive planning for not only its two wastewater treatment facilities (WWTFs) – the advanced-primary Peirce Island WWTF and the secondary Pease Development Authority (PDA) WWTF - but for the abatement of its three remaining Combined Sewer Overflows (CSOs) as well. Thus, the WMP encompasses the elements of two distinct planning programs: a Wastewater Treatment Facilities Plan Update (WWTFP) and a CSO Long-Term Control Plan Update (LTCP). Because the planning will consider possible flow shedding, or re-direction, between the WWTFs and/or other sites, and problem areas within both the combined and separately sewered areas, all aspects of the City's wastewater infrastructure will be addressed in the WMP.

This Work Plan outlines the tasks to complete the comprehensive wastewater facilities plan and update to the LTCP to allow the selection of the most environmentally sound, sustainable and cost effective solution to meet current and foreseeable water quality standards.

Public participation as discussed in Task 11 of this Work Plan will be critical to the selection, acceptance and implementation of the final option. Public meetings will be held through-out the development of the WMP to both solicit input and present results. The City's Web site will be used to post meeting schedules as well as interim reports which will allow interested parties to track the progress of the WMP.

This study will be conducted in a manner consistent with the New Hampshire Department of Environmental Services State Revolving Fund loan program to maximize the grant and loan eligibility of the selected option. In addition, this study will look at means of reducing the financial impact to the users by identifying regional opportunities that may help reduce the capital cost to the current users. These opportunities such as regional septage, biosolids, and fats oils and grease (FOG) treatment (Tasks 3.4 and 3.5) may be incorporated into a new WWTF at an economy of scale which would reduce the cost to the regional players while at the same time contributing to the funding of a new WWTF.

The WMP will be undertaken by the following project team:

- ***Client: The City of Portsmouth, New Hampshire***
- ***Planning Consultant Team: Weston & Sampson and Brown and Caldwell***
- ***City Advisory Consultant: Underwood Engineers, Inc.***

Task 1. Define Study Parameters And Develop Project Boundaries

The purpose of this task is to identify project parameters and to set the boundaries of the WMP. The parameters to be identified include geographic boundaries, political boundaries and public participation boundaries.

1.1. Three (3) meetings with project team will be held to define WMP parameters. The following subtasks will be performed:

1.1.1. Identify Study Area based on geographic and political boundaries.

1.1.2. Identify alternative wastewater treatment facility (WWTF) sites.

1.1.3. Identify regional communities that may be included in the Study Area. The Study Area identified in Task 1.1.1. may be modified based on the results of this Task.

1.1.3.1. Review the New Hampshire Seacoast Regional Wastewater Management Study and identify stakeholders.

1.1.3.2. Hold informal meetings with the City and officials from area communities to introduce the project.

1.1.4. Regional involvement may include the following entities:

- Newcastle
- Rye
- Newington
- North Hampton
- Greenland
- Pease Development Authority
- The Seacoast Regional Wastewater Management Study

1.1.4.1. Perform a preliminary evaluation of need for the disposal of wastewater, biosolids, septage and fats, oils and grease (FOG) from surrounding communities.

1.1.4.2. In addition, other communities in the Seacoast Region may be included in the study for the purposes of providing regional biosolids, septage and fats, oils and grease (FOG) services in the context of WWTF capacity.

1.2. Define planning horizons for the WMP. Consideration will be given to equipment and structure life, land requirements and build-out conditions.

1.3. Define sustainability goals for the WMP based on the City's Global Master Plan and discussions with the City.

Task 2. Regulatory Requirements Review

The purpose of this task is to review current regulatory requirements including permits, guidance documents, etc. and to identify regulatory agency requirements that will be imposed on the City for both the WWTFP and LTCP Updates.

- 2.1. Review pertinent EPA and NHDES documents and correspondence that are in the City's possession, including the following:**
 - 2.1.1.1. Current NPDES permit*
 - 2.1.1.2. Current Consent Decree (or modification there to)*
 - 2.1.1.3. Pending Administrative Order*
 - 2.1.1.4. New Consent Decree*
- 2.2. Review EPA and NHDES WWTFP and LTCP Requirements and Guidance Documents.**
- 2.3. Prepare for, coordinate and attend up to two (2) regulatory requirements meeting with EPA and NHDES to review and establish:**
 - 2.3.1. Administrative Order and or Consent Decree findings, technical requirements, and schedule.*
 - 2.3.2. WWTF Issues*
 - 2.3.2.1. Site permitting issues, and*
 - 2.3.2.2. Outfall permitting requirements and modeling requirements*
 - 2.3.2.3. Possible future, more stringent effluent limitations (i.e. total Nitrogen)*
 - 2.3.3. CSO LTCP*
 - 2.3.3.1. CSO LTCP requirements*
 - 2.3.3.2. Applicable water quality standards*
 - 2.3.3.3. Pollutants of concern*
 - 2.3.3.4. Control levels for treated CSO discharges (i.e., Presumptive or Demonstrative Approach per 1994 EPA CSO Control Policy)*

2.3.3.5. *Treatment levels for satellite and/or primary-bypassed CSO discharges (i.e., will bypassing be allowed or will blending be required)*

2.3.3.6. *How compliance will be established*

2.4. Develop a regulatory requirements technical memorandum (TM) summarizing the findings of the above tasks.

2.4.1. *Provide a draft of the TM to the City for review.*

2.4.2. *Meet with City to review Draft TM and solicit comments.*

2.4.3. *Finalize Draft TM and submit to the City for submittal to NHDES and EPA.*

Task 3. Flow And Loads Forecasting

The purpose of this task is to forecast wastewater (dry weather) and stormwater (wet weather) flows and pollutant loadings for use in the planning process. Data outside of the Study Area will only be sought and evaluated if the wider regional biosolids, septage and FOG concept advances in the planning process.

3.1. Current sewer flows will be established based upon current zoning and the following efforts:

3.1.1. *Evaluate past reports, pump station flow records, WWTF records, collection system metering and CSO flow records..*

3.1.1.1. *Review and recommend, as necessary, improvements to data collection activities.*

3.1.2. *Collect, develop, and evaluate data to support development of flow including population data, water use records, land use, sewer area, basin boundaries, etc..*

3.1.3. *Define and determine wastewater generation rates for residential, commercial, and industrial customers.*

3.1.4. *Update existing report data summaries to current conditions based on the above tasks.*

3.2. Septic flows and septic system failures will be identified to evaluate the need for increased septage receiving capacity within the Study Area and the need for sewer system extensions within the Study Area to areas with failed septic systems.

3.2.1. *Estimates of biosolids generation, septage and FOG disposal needs from surrounding communities based on site visits and interviews with their WWTF staff, public works directors, DES staff and other appropriate parties.*

3.2.2. *Evaluate need for regional septage disposal based on:*

3.2.2.1. *Septage receiving records for the Pease WWTF and WWTFs in communities within the Study Area.*

3.2.2.2. *Informal interviews with commercial septage haulers that service the Study Area.*

3.2.2.3. *Discussions with NHDES officials.*

3.2.3. *Review City records to quantify reported septic system failures.*

3.2.4. *Implement a septic system survey throughout the Study Area in areas where sewer system extensions tributary to the City's collection system are feasible to document need and establish funding eligibility.*

3.2.5. *Provide GIS data mapping information to City identifying septic system problem areas.*

3.3. Future sewer flow projections will be developed based upon current zoning and the following:

3.3.1. *Review open space availability based on the City's GIS system, Tax maps and available reports.*

3.3.2. *Attend two (2) meetings with City's Planning Department to determine areas of planned and potential sewer growth.*

3.3.2.1. *Review proposed changes in zoning*

3.3.3. *Attend five (5) meetings with regional communities to determine areas of potential sewer growth outside the City of Portsmouth, and within the Study Area defined in Task 1.*

3.3.4. *Develop up to four (4) growth forecasts for the Study Area. These forecasts will be based on available growth data for the City, adjacent communities, and available regional planning efforts. Forecasts will include:*

- Current baseline conditions
- 50 year forecast
- 20-year forecast
- Build-out conditions

- 3.3.5. *Develop up to four (4) flow/load forecast models based on the above tasks for various growth scenarios.*
- 3.3.6. *Develop a TM summarizing flow and load projections based on the above Task 3 efforts.*
 - 3.3.6.1. *Provide a draft of the TM to the City for review.*
 - 3.3.6.2. *Meet with City to review TM and solicit comments.*
 - 3.3.6.3. *Finalize TM and submit to the City.*
- 3.4. **The need for a biosolids handling facility within the Study Area, will be evaluated based on current biosolids production and disposal methods.**
 - 3.4.1. *Establish regional biosolids generation projections based on growth forecasts, utilizing current conditions as a base line.*
 - 3.4.2. *Determine biosolids handling capacities at WWTF's within the Study Area based on available data and evaluate the potential for regional biosolids handling.*
 - 3.4.3. *Develop a TM summarizing the need for regional biosolids handling based on the above tasks.*
 - 3.4.3.1. *Provide a draft of the TM to the City for review.*
 - 3.4.3.2. *Meet with City to review TM and solicit comments.*
 - 3.4.3.3. *Finalize TM and submit to the City.*
- 3.5. **The need for a regional FOG handling facility within the Study Area will be evaluated based on current FOG receiving and disposal methods.**
 - 3.5.1. *Establish regional FOG disposal projections based on growth forecasts, utilizing current conditions as a base line.*
 - 3.5.2. *Determine FOG handling capacities at WWTF's within the Study Area based on available data and evaluate the potential for regional FOG handling.*
 - 3.5.3. *Develop a TM summarizing the need for regional FOG handling based on the above tasks.*
 - 3.5.3.1. *Provide a draft of the TM to the City for review.*
 - 3.5.3.2. *Meet with City to review TM and solicit comments.*

3.5.3.3. *Finalize draft TM and submit to the City.*

Task 4. Collection System Evaluation

The purpose of this task is to establish a base line for system performance for dry weather and wet weather flows within the current collection system and to project the impact of future flows on the collection system. The evaluation will be used as part of the development of the LTCP Update portion of the WMP.

4.1. Conduct field observations during up to three (3) significant storm events with City personnel to confirm problem areas.

4.1.1. Review existing mapping and other pertinent data regarding known problem areas.

4.1.1.1. Document findings for incorporation in to Sewer System Model.

4.2. Develop a flow/rain monitoring program to supplement the current program, if needed, for the purposes of both compliance monitoring and the Sewer System Model update.

4.2.1. Meet with City and review data on current flow monitoring programs.

4.2.1.1. Evaluate current data collection efforts and recommend the following additional data collection methods, as required:

4.2.1.2. To supplement existing data, identify up to 12 metering sites, up to six (6) groundwater monitoring sites, and up to three (3) rain gauge locations throughout the collection system.

4.2.1.3. Install, operate and maintain flow meters and rain gauges, including data logging devices, for a period of up to 12 months.

4.2.1.4. Install, operate and maintain piezometers and data logging devices for a period of up to 36 months.

4.2.1.5. Analyze and process data on a monthly basis and make recommendations for changes, as appropriate.

4.3. Review historical regulatory compliance for the combined system.

4.3.1. Confirm CSO control goals as established by NHDES and EPA in Task 2.

- 4.3.2. *Assess compliance and success of current Nine Minimum Controls (NMC) implementation efforts.*
- 4.3.3. *Determine if additional activities to augment the NMC are warranted.*
- 4.3.4. *Evaluate success of recent abatement efforts.*
 - 4.3.4.1. *Incorporate representative flow data provided by the City for targeted sewer separation areas, pump station upgrades, and system optimization efforts into the Sewer System Model.*
 - 4.3.4.2. *Use the Sewer System Model to identify benefits of recent CSO abatement efforts.*
- 4.3.5. *Develop a TM summarizing the CSO abatement efforts and modeled benefits.*
 - 4.3.5.1. *Provide a draft of the TM to the City for review.*
 - 4.3.5.2. *Meet with City to review TM and solicit comments.*
 - 4.3.5.3. *Finalize TM and submit to the City.*
- 4.4. **The existing Sewer System Model will be updated based on current flow data and hydraulic conditions will be confirmed.**
 - 4.4.1. *Sewer sub-systems will be added to the Sewer System Model, as needed, to establish baseline conditions by further refining hydraulic conditions and to evaluate flow shedding and re-direction options as detailed in later tasks.*
 - 4.4.2. *Review historic data and information on the physical characteristics of the collection system facilities.*
 - 4.4.2.1. *Review available inspection and television reports, as necessary, to verify existing conditions and identify additional needs.*
 - 4.4.2.2. *Recommend additional inspection needs that may be warranted.*
 - 4.4.2.3. *Review City's sewer rehabilitation program and targeted sewer separation efforts to date.*
 - 4.4.3. *Update hydrological data to:*
 - 4.4.3.1. *Characterize I/I in sanitary system*

- 4.4.3.2. *Develop "desk top" summary of extraneous flows using the last 4 years of available data.*
- 4.4.3.3. *Compile available rainfall, CSO, collection system and WWTF flow data and evaluate*
 - *Dry and wet weather WWTF hydraulic loadings*
 - *Dry and wet weather pump station flows*
 - *Current wet weather percent capture and CSO volumes*
 - *Duration and frequency of occurrence*
 - *Minimum storm event which triggers CSOs*
 - *Annual, seasonal and monthly statistics of CSO events*
- 4.4.4. *Update combined Sewer System Model to reflect recent modifications.*
 - 4.4.4.1. *Calibrate model to reflect existing conditions and generate a baseline model.*
- 4.4.5. *Evaluate hydraulic impacts of current planned and potential growth within City and regionally.*
 - 4.4.5.1. *Based on the results of Task 3, incorporate selected regional planning data into the Sewer System Model.*
 - 4.4.5.2. *Based on the results of Task 3, incorporate three (3) of the growth forecasts into the Sewer System Model to identify hydraulic restrictions and potential CSO impacts.*
- 4.4.6. *Develop a TM summarizing the baseline Sewer System Model and growth forecast impacts.*
 - 4.4.6.1. *Provide a draft of the TM to the City for review.*
 - 4.4.6.2. *Meet with City to review TM and solicit comments.*
 - 4.4.6.3. *Finalize Draft TM and submit to the City.*
- 4.5. **Evaluate the impacts of CSOs on receiving water quality.**
 - 4.5.1. *Review previous water quality data and projects from the 2005 LTCP Update and more recent reporting, if available, and determine if the water quality objectives are still attainable from a regulatory perspective.*
 - 4.5.2. *Depending on the results of the above tasks, the need for additional ambient water quality analysis will be recommended. This effort is not included in this Scope.*

Task 5. Alternatives Evaluation

The purpose of this task is to evaluate the full range of alternatives necessary to meet regulatory compliance including potential nutrient limits (i.e. total Nitrogen). This evaluation will conform with DES funding requirements and will evaluate a full range of alternative processes, technologies and practices for the WWTP and LTCP Updates.

5.1. Select decision-making process and decision making criteria.

5.1.1. Prepare for and coordinate one (1) workshop for selection.

5.1.1.1. *Submit TM summarizing decision making process and selection criteria to City for comment*

5.1.1.2. *Meet with City to discuss TM and modify as necessary.*

5.1.1.3. *Submit Final Draft TM to City*

5.2. Public outreach meeting to discuss technologies, in concert with Task 11.

5.3. Perform environmental and societal evaluation of alternatives including but not limited to National Historic Preservation Act and National Environmental Policy Act.

5.4. Evaluate and screen alternatives

5.4.1. *Prepare "Talking Points" technology memo and submit to City.*

5.4.2. *Prepare for, coordinate, and attend workshop session with the City to develop "Range of Alternatives" and perform screening to develop a set of applicable alternatives.*

5.4.3. *Develop a TM summarizing the applicable alternatives.*

5.4.3.1. *Provide a draft of the TM to the City for review.*

5.4.3.2. *Meet with City to review TM and solicit comments.*

5.4.3.3. *Finalize Draft TM and submit to the City.*

5.5. From the screenings effort, evaluate up to four (4) feasible technologies to comply with regulatory requirements that may be implemented at each of three (3) potential WWTF sites (Peirce Island, Pease WWTF and a possible new WWTF site) and for the collection system. For each alternative, the following steps will be performed:

5.5.1. *Evaluation of WWTF alternatives:*

- 5.5.1.1. *For new sites (if needed), identify ownership, soil conditions, site constraints, regulatory constraints, etc.*
- 5.5.1.2. *Evaluate applicable treatment technologies for each site:*
- 5.5.1.3. *Dry weather flow options for the full secondary treatment of the dry weather component, with primary or advanced-primary treatment of wet weather flows.*
- 5.5.1.4. *Full secondary treatment of all dry and wet weather flows (only if required by EPA and NHDES).*
- 5.5.1.5. *Wet weather only options such as chemically enhanced primary treatment, vortex, ballasted sedimentation, compressed media filters, or other high-rate system, with dry weather flows treated at other locations.*
- 5.5.2. *Evaluation of collection system components of alternatives and impacts on LTCP:*
 - 5.5.2.1. *If flow shedding or re-direction of sewage flow is required for an alternative:*
 - Evaluate flow shedding of various percentages of dry weather flows currently tributary to the Peirce Island WWTF, and/or
 - Evaluate flow shedding of flows currently tributary to the Pease WWTF to a new site. The Sewer System Model will be used in the analysis as needed.
 - 5.5.2.2. *Identify collection system improvement needs*
 - 5.5.2.3. *For wet weather flows that will not be treated at existing or proposed WTF sites, evaluate treatment/mitigation alternatives that include, but are not limited to:*
 - Continued targeted or full sewer separation
 - Satellite treatment using chemically enhanced primary treatment
 - Vortex separation
 - Compressed media filters
 - Ballasted sedimentation
 - Other high-rate treatment system
 - Off-line storage, or
 - In-line or conduit storage.

5.6. Concept Level Design Evaluation

5.6.1. For WWTF alternatives, develop concept-level designs including size, layouts, process flow diagrams, and life-cycle costs.

5.6.2. For CSO abatement alternatives, develop costs for a range of control levels per the EPA CSO Control Policy.

5.7. Perform ranking evaluation of alternatives based on Task 5.1

5.7.1. Prepare for and present rankings review for both WWTFP and LTCP at one (1) public meeting. The presentation will include discussions regarding:

5.7.1.1. Development of ranking system

5.7.1.2. Development of evaluation criteria

5.7.1.3. Presentation of findings of Task 5.6.

5.8. Development of Recommended Alternative

5.8.1. Perform additional site-specific evaluations to confirm findings for recommended alternatives.

5.8.2. Pilot test recommended alternative(s), if warranted

5.8.3. Prepare Draft Recommendation Report

5.8.4. Submit Draft Recommendation Report to City for review

5.8.5. Review Recommendation Report with City

5.8.6. Finalize Recommendation Report and submit to EPA and NHDES

5.8.7. Meet with EPA and NHDES

5.9. Develop TM to document alternative evaluation

5.9.1. Submit TM to City for comment

5.9.2. Meet with City to discuss TM

5.9.3. Revise TM as needed

5.10. Prepare for and present recommended alternative for WWTFP and LTCP at one (1) public meeting.

Task 6. Develop Funding Strategies

The purpose of this task is to identify and assist the City in procuring funding for the WMP implementation.

- 6.1. Meet with the City and City's Advisory Consultant throughout the development of the WMP to identify potential funding sources.
- 6.2. Evaluate the debt retirement payments and long-term replacement/refurbishment costs and O&M costs for existing and proposed capital improvements and other proposed activities resulting from the WMP.
- 6.3. Compile and evaluate all current and proposed water and wastewater capital programs, replacement/refurbishment activities, and O&M activities that will affect current water and sewer rates.
- 6.4. Update water and sewer rate model based on proposed costs for implementing WMP over a range of implementation periods.
- 6.5. Perform an Affordability Analysis per EPA Guidelines and determine affordability.
- 6.6. Assist the City's Advisory Consultant and City with preparation of funding applications on behalf of the City, as appropriate.

Task 7. Implementation Schedule

The purpose of this task is to develop an implementation schedule for the capital projects and other recommended practices and activities identified in the draft WMP and based on the previously performed Affordability Analysis.

- 7.1. Develop a draft implementation schedule for the WMP.
- 7.2. Review draft schedule with City and City's Advisory Consultant.
- 7.3. Finalize draft implementation schedule
- 7.4. Submit draft implementation schedule to EPA and NHDES
- 7.5. Meet with EPA and NHDES to discuss draft implementation schedule and revise as necessary
- 7.6. Finalize implementation schedule and incorporate into final WMP.

Task 8. Preparation of the WMP Document

8.1. The WMP will be comprised of a minimum of three (3) volumes:

8.1.1. Vol. 1 - Main body will contain sections common to both the WWTFP Update and CSO LTCP Update

8.1.2. Vol. 2 - WWTFP Update sections

8.1.3. Vol. 3 - CSO LTCP sections

8.2. The preparation of the WWTFP and CSO LTCP Updates are outlined in Sections 9 and 10.

Task 9. Wastewater Treatment Facilities Plan Update

The purpose of this task is to prepare the WWTP Update portion of the WMP.

- 9.1. From the previous tasks, compile and prepare the draft WWTFP Update.**
- 9.2. Submit Draft Preliminary WWTFP Update to City for review**
- 9.3. Meet with City to review Draft Preliminary WWTFP Update**
- 9.4. Finalize Draft WWTFP Update based on City comments**
- 9.5. Submit Draft Final WWTFP Update to EPA and NHDES**
- 9.6. Meet with EPA and NHDES to discuss Draft Final WWTFP Update**
- 9.7. Finalize Wastewater WWTFP Update**
- 9.8. Present WWTFP Update to City Council**
- 9.9. Submit Final WWTFP Update to EPA and NHDES**
- 9.10. Coordinate and attend a Public Meeting to present the plan**
- 9.11. Update website and issue newsletter**

Task 10. CSO LTCP Update

The purpose of this task is to prepare the CSO LTCP Update portion of the WMP.

- 10.1. From the previous tasks, compile and prepare the Draft Preliminary LTCP Update**

- 10.2. Submit Draft Preliminary LTCP Plan update to City for review**
- 10.3. Meet with City to review Draft Preliminary LTCP Plan update**
- 10.4. Finalize Draft LTCP Plan based on City comments**
- 10.5. Submit Draft Final LTCP Update to EPA and NHDES**
- 10.6. Meet with EPA and NHDES to discuss Draft Final LTCP Update**
- 10.7. Finalize LTCP Update**
- 10.8. Present LTCP Update to City Council**
- 10.9. Submit Final LTCP Update to EPA and NHDES**
- 10.10. Coordinate and attend a Public Meeting to present the Final LTCP Update**

Task 11. Public and Regulatory Participation Program

The purpose of this task is to develop a public participation program to garner approval of the project from interested parties. The subtasks associated with this task will be ongoing throughout the project.

- 11.1. At the onset of this project the consultant working with the City will develop a public information website to disseminate information regarding the WMP to the general public. All information to be posted to the website will be pre-approved by the City of Portsmouth.**
- 11.2. Prepare a press release for the City of Portsmouth to announce the WMP and inform citizens of the website. This press release may also include the regional communities identified in Task 1.1.**
- 11.3. Prepare and present a "Wastewater 101" public meeting to begin the education process of work necessary to perform and complete the WMP. This presentation may be recorded for broadcast on the local access cable channel.**

The specific sub-tasks associated with Task 11 will evolve as the project progresses. The actual Scope of Work to be performed under Task 11 will be based upon the City's needs and will be agreed upon prior to commencement of work associated with Task 11. Where specific Public and Regulatory Participation Tasks are known, they have been presented within the context of that main task (i.e. Task 5).

Task 12. Project Management

The purpose of this task is to provide project management oversight and provide the required effort to coordinate the project with applicable regulatory agencies.

- 12.1. In addition to the typical project management duties of project coordination, invoicing, and project communication, the Planning Consultant shall also:**
- 12.2. Prepare for and attend monthly update meetings with City and City's Advisory Consultant.**
- 12.3. Submit quarterly and annual status reports to City, EPA and DES**
- 12.4. Provide schedule updates to City, EPA and DES as warranted.**

APPENDIX B.1

Milestones and Schedules

1. The City shall implement the WMP, including construction of secondary treatment facilities, in accordance with Appendix B, and as follows:

a. By no later than October 1, 2009, the City shall submit to EPA and the NHDES for review and approval, in accordance with Task 4 of the WMP, a draft evaluation of the Sewer System to characterize its current performance in dry and wet weather and to project the impact of future flows on the System. By November 1, 2009, the City shall complete Task 4.

b. By no later than December 1, 2009, the City shall submit to EPA and the NHDES for review and approval, in accordance with Task 5 of the WMP, a draft evaluation of the full range of alternative processes, technologies, and practices for the Facility and Combined Sewer Overflow Facilities necessary to meet all applicable statutory and regulatory requirements. By no later than March 1, 2010, the City shall complete Task 5.

c. By no later than June 1, 2010, the City shall submit to EPA and the NHDES for review and approval, in accordance with Task 6 of the WMP, a draft report identifying and developing funding strategies necessary to complete all required Facility upgrades and improvements. By September 1, 2010, the City shall complete Task 6.

d. By no later than June 1, 2010, the City shall submit to EPA and the NHDES for review and approval, in accordance with Task 7 of the WMP, a proposed schedule for all Facility upgrades and improvements. By September 1, 2010, the City shall submit a final schedule for all Facility upgrades and improvements for incorporation into the Consent Decree, subject to the City's rights to dispute resolution under Section VIII. The proposed schedule shall include an implementation and completion schedule that is as expeditious as practicable

consistent with sound engineering practice and normal construction practices.

e. By no later than June 1, 2010, the City shall submit to EPA and the NHDES for review and approval, in accordance with Task 9 of the WMP, a draft work plan for all upgrades and improvements to the WWTF, including construction of secondary treatment facilities ("WWTF Work Plan"). By September 1, 2010, the City shall submit a final WWTF Work, subject to the City's rights to dispute resolution under Section VIII. The proposed schedule shall include an implementation and completion schedule that is as expeditious as practicable consistent with sound engineering practice and normal construction practices.

a. By no later than June 1, 2010, the City shall submit to EPA and the NHDES for review and approval, in accordance with Task 10 of the WMP, proposed revisions to the LTCP necessary to bring the Combined Sewer Overflow Facilities into compliance with all applicable federal and state laws and regulations with respect to CSO Discharges from the Facility ("LTCP Update"). By September 1, 2010, the City shall submit a final LTCP Update, subject to the City's rights to dispute resolution under Section VIII. The proposed schedule shall include an implementation and completion schedule that is as expeditious as practicable consistent with sound engineering practice and normal construction practices.

APPENDIX C

Interim Emissions/Effluent Limits

INTERIM EFFLUENT LIMITATIONS AND MONITORING REQUIREMENTS for Outfall Serial Number 001

Effluent Characteristic	Discharge Limitations			Monitoring Requirements	
	Average Monthly	Average Weekly	Maximum Daily	Measurement Frequency	Sample Type
Flow	Report	--	Report	Continuous	Recorder
Biochemical Oxygen Demand ₅ ("BOD ₅ ") mg/l (lbs/day)	150(6005)	Report	Report	2/week	24-Hour Composite
Total Suspended Solids ("TSS") mg/l (lbs/day)	95(3803)	Report	Report	2/week	24-hour composite
BOD ₅ Minimum Percent Removal	30	--	--	1/Month	Calculated
TSS Minimum Percent Removal	30	--	--	1/Month	Calculated
Total Residual Chlorine ^a	See Permit	--	See Permit	2/Day	Grab
Chlorine Usage ^a	--	--	--	Continuous	SCADA System
Whole Effluent Toxicity ^b , LC50, % effluent	--	--	Report	1/Year	24-Hour Composite
(WET Sample) Ammonia as Nitrogen, Total Recoverable Al, Cd, Cu, Pb, Ni, Zn	--	--	Report	1/Year	24-Hour Composite

Footnote^a: Use the SCADA system to monitor the fluid level of the bulk chlorine storage tank and maintain a bound logbook with complete records of chemical use, chemical feed pumps activity, any alarms for chemical feed pump failure and leakage, chlorination system maintenance and repair, and SCADA system maintenance.

Footnote^b: Beginning in 2008, the tests shall be performed during the July-September calendar quarter using *Menidia beryllina* and *Mysidopsis bahia* with results postmarked by October 15th.

Monitoring Requirements		Discharge Limitations		Effluent Characteristics	
Sample Type	Monitoring Frequency	Maximum Daily	Average Weekly	Average Monthly	Effluent Limitation
Residuals	Continuous	Report	Report	Report	Flow
24-hour Composite	Weekly	Report	Report	Report (100000)	Chemical Oxygen Demand (COD) max
24-hour Composite	Weekly	Report	Report	Report (200000)	Five Day BOD (5-day)

Lauren J. Noether
 Senior Assistant Attorney General
 Environmental Protection Bureau
 33 Capital Street
 Concord, NH 03301

/s/ Peter M. Flynn
 PETER M. FLYNN
 Senior Attorney
 Environmental Enforcement Section
 U.S. Department of Justice
 Ben Franklin Station
 P.O. Box 7611
 Washington, DC 20044-7611
 (202) 514-4352

CERTIFICATE OF SERVICE

The undersigned, a duly qualified person, hereby certifies that on August 1, 2005, he caused a true copy of the attached "Notice of Lodging of Consent Decree" to be served upon the undersigned at the address set forth below by United States mail, postage prepaid.

Hilton, Joy (Palmer)

From: Wood, Tracy L [Tracy.Wood@des.nh.gov]
Sent: Tuesday, June 04, 2013 11:47 AM
To: Hilton, Joy (Palmer)
Subject: Addresses as Requested

E. Tupper Kinder, Esq.
Nelson Kinder & Mosseau
99 Middle Street
Manchester, NH 03101
ekinder@nkmlawyers.com

K. Allen Brooks
Sr. Asst. Attorney General
NH Dept. of Justice
33 Capitol Street
Concord, NH 03301
allen.brooks@doj.nh.gov



U.S. Department of Justice

United States Attorney

District of New Hampshire

November 14, 1990

Federal Building

P. O. Box 480

Concord, New Hampshire 03302-0480

603/225-1552

James Starr, Clerk
United States District Court
55 Pleasant Street
Concord, NH 03301

Re: United States v. City of Portsmouth, N.H.
Civil No. 89-234-S, U.S.D.C., D.N.H.

Dear Mr. Starr:

Enclosed please find for filing in the above-entitled action the United States' Notice of Lodging of Consent Decree and lodged Consent Decree.

Please ask the Court not to sign the Consent Decree until the thirty-day public comment period required by Department of Justice policy, 28 C.F.R. § 50.7, has expired. Counsel for the United States will notify the Court when the public comment period has expired.

Thank you for your cooperation.

Very truly yours,

JEFFREY R. HOWARD
United States Attorney

By: 

Nancy E. Hart
Assistant U.S. Attorney

NEH:djr

cc: Steven Houran, Esq.
✓ Robert P. Sullivan, Esq.

Enclosure

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

United States of America,)	
)	
Plaintiff,)	
)	
v.)	Civil No. 89-234-S
)	
City of Portsmouth, New Hampshire,)	
)	
Defendant.)	
<hr/>		

UNITED STATES' NOTICE OF LODGING OF CONSENT DECREE

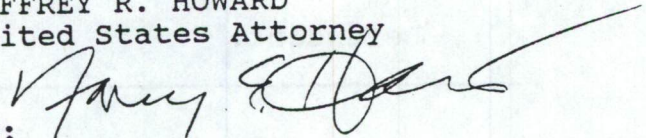
Plaintiff, the United States of America, notifies the Court that it is today lodging a Consent Decree in this case pending solicitation and consideration of public comments, as required by Department of Justice policy, 28 C.F.R. § 50.7.

In accordance with the Department of Justice policy, 28 C.F.R. § 50.7, the Department of Justice will publish in the Federal Register a notice of the lodging of this Consent Decree. The notice will solicit public comments on the Consent Decree for a period of thirty (30) days from the date of publication. After the close of the comment period, the United States will evaluate any comments received and advise the Court as to whether the United States will request that the Consent Decree be entered.

The United States asks the Court to take no action with respect to the lodged Consent Decree until the United States requests entry or otherwise advises the Court.

Respectfully submitted,

JEFFREY R. HOWARD
United States Attorney

By: 
Nancy E. Hart
Assistant U. S. Attorney

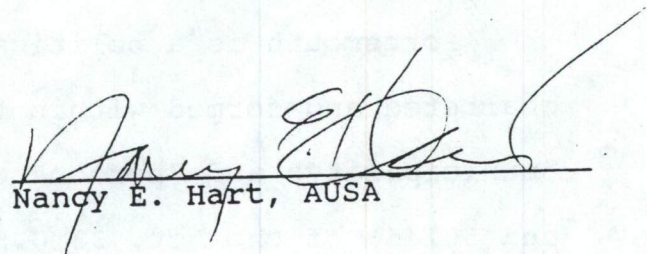
November 14, 1990

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Notice has been mailed, postage prepaid, this date to:

Steven Houran
Senior Assistant Attorney General
State of New Hampshire
25 Capitol Street
Concord, NH 03301

Robert P. Sullivan
City Attorney
P.O. Box 628
Portsmouth, NH 03801


Nancy E. Hart, AUSA

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

United States of America,)	
)	
Plaintiff,)	
)	
v.)	Civil No. 89-234-D
)	
City of Portsmouth, New Hampshire,)	
)	
Defendant.)	
_____)	

CONSENT DECREE

The United States of America ("United States"), on behalf of the United States Environmental Protection Agency ("EPA"), and the State of New Hampshire filed separate Complaints against the City of Portsmouth, New Hampshire ("Portsmouth") for repeated and continuing violations of the Clean Water Act ("the Act"), 33 U.S.C. § 1251 et seq., its National Pollutant Discharge Elimination System ("NPDES") permit issued by EPA pursuant to Section 402 of the Act, 33 U.S.C. § 1342, and of New Hampshire RSA Ch. 149.

Portsmouth is a political subdivision of New Hampshire, duly chartered and formed within the laws of New Hampshire and is a "municipality" and "person" within the meaning of Sections 502(4) and 502(5) of the Act, 33 U.S.C. §§ 1362(4) and 1362(5). Portsmouth owns and operates a 1.5 million gallon per day (average design flow) wastewater treatment plant at Pierce Island ("the treatment plant") and associated sewer lines.

The United States, City of Portsmouth, and State of New Hampshire, without adjudication of the facts or the law, agree that settlement of this matter is in the public interest and that

entry of this Decree without further litigation, is an appropriate resolution to this dispute, and the parties consent to the entry of this Decree.

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

STATEMENT OF THE CLAIM.

1. The Complaint of the United States states a claim pursuant to Sections 309(b) and (d) of the Clean Water Act, 33 U.S.C. §§ 1319(b) and (d), for injunctive relief and civil penalties against the City of Portsmouth, New Hampshire. The State of New Hampshire intervened in this action as a plaintiff and asserts claims pursuant to New Hampshire RSA 149:8, III-a, and RSA 149:19. The United States preserves its claim against the State of New Hampshire under Section 309(e) of the Act, 33 U.S.C. § 1319(e), which provides that the State shall be liable for payment of any judgment, or any expenses incurred as a result of complying with any judgment entered against the City to the extent that the laws of the State prevent the City from raising the revenues needed to comply with such judgment. The State of New Hampshire reserves all defenses in the event the United States brings any claim pursuant to Section 309(e).

JURISDICTION AND VENUE.

2. Jurisdiction is vested in this Court pursuant to 28 U.S.C. §§ 1331, 1345, and 1355 and Section 309(b) of the Act, 33 U.S.C. § 1319(b). Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391(b) and Section 309(b) of the Act, 33

U.S.C. § 1319(b), because this is the judicial district where Portsmouth is located and where the alleged violations occurred.

APPLICATION

3. The provisions of this Consent Decree shall be binding upon the United States, the State of New Hampshire, and City of Portsmouth, and upon Portsmouth's officers, directors, managers, agents, trustees, servants, employees, successors, assigns, attorneys, and all persons, firms, and corporations acting under, through, or on behalf of Portsmouth. No later than thirty (30) days prior to transfer of ownership, operation, or other interest in the Portsmouth Wastewater Treatment Plant, Portsmouth shall give written notice and a copy of this Consent Decree to any successors in interest. Portsmouth shall condition the transfer of ownership, operation, other interests, or any contract related to the performance of the Consent Decree upon the successful execution of the terms and conditions of this Decree. Portsmouth shall notify in writing the United States Attorney for the District of New Hampshire, the United States Environmental Protection Agency, Region I, the United States Department of Justice, the Department of Environmental Services of the State of New Hampshire ("DES") and the Attorney General of the State of New Hampshire of any successor-in-interest at least thirty (30) days prior to any transfer and that notice and a copy of the Decree has been given to the successor-in-interest by Portsmouth.

OBJECTIVES.

4. It is the express purpose of the parties in consenting to this Decree to further the objectives of the Clean Water Act, as enunciated at Section 101 of the Act, 33 U.S.C. § 1251. All plans, studies, construction, remedial maintenance, monitoring programs, and other obligations of the Decree, or resulting from the activities resulting from this Decree, shall have the objectives of causing Portsmouth to come into and remain in full compliance with the Clean Water Act, including compliance with the terms and conditions of its NPDES Permit, renewals or amendments to that Permit, and the provisions of applicable Federal and State laws and regulations governing discharges from Portsmouth's wastewater treatment plant.

DEFINITIONS.

5. Unless otherwise defined herein, the terms used in this Consent Decree shall have the meaning given to those terms in the Clean Water Act, 33 U.S.C. § 1251 et seq., the regulations promulgated thereunder, 40 C.F.R. § 401.11, and in the applicable NPDES Permit.

CONSTRUCTION SCHEDULE.

6.A. Portsmouth shall undertake a program to achieve and thereafter maintain compliance with the Clean Water Act and its NPDES Permit by completing the construction of the upgraded wastewater treatment facility as set forth below. Portsmouth shall complete each required task on or before the deadline set forth in the following schedule:

<u>Task</u>	<u>Deadline</u>
a. Portsmouth shall revise Design Plans and Specifications for the upgraded wastewater treatment plant and submit to the State for final approval.	September 7, 1989
b. Portsmouth shall submit final Design Plans and Specifications to the State for a new primary effluent filter and ancillary equipment for approval.	September 7, 1989
c. Portsmouth shall advertise for bids from prospective contractors for the construction of its upgraded wastewater treatment plant, including the new primary effluent filter, requesting that bids be received by December 8, 1989.	October 8, 1989
d. Portsmouth shall award the contract for construction of its upgraded wastewater treatment plant.	January 15, 1990
e. Portsmouth shall commence construction of its upgraded waterwater treatment plant.	January 22, 1990
f. Portsmouth shall accept wastewater flow and initiate operation of its upgraded wastewater treatment plant, including treatment of full flow. Portsmouth shall substantially complete construction of the upgraded treatment plant. "[S]ubstantially complete construction" means to complete in all respects so as to be capable of and begin accepting entry of and treating full flow.	October 25, 1991

February 25, 1992

- g. Portsmouth shall achieve full operation of the upgraded wastewater treatment plant and achieve and maintain compliance with the final effluent limits, monitoring requirements, and conditions set forth in this Decree, its applicable NPDES Permit, and the Clean Water Act. Portsmouth shall cease discharging untreated wastewater unless bypassing is explicitly permitted pursuant to 40 C.F.R. 122.41(m) and then subject to the conditions therein.

6.B. Portsmouth may request extension(s) of the deadline in paragraph 6.A.f., not to exceed 12 weeks total, for change orders subject to approval by the State. The deadline in paragraph 6Af shall not be extended beyond 12 weeks total, i.e., to no later than January 22, 1992, and the requested extension(s) must be approved by the State. Any such extension(s) of the deadline in paragraph 6.A.f. shall not change the deadline in 6.A.g.

INTERIM EFFLUENT LIMITS

7. Portsmouth shall, at a minimum, comply with the following interim effluent limits and requirements from the date of entry of this Decree until February 25, 1992.

<u>Pollutant</u>	<u>Limitation</u>		<u>Monitoring Requirements</u>	
	<u>Maximum Daily</u>	<u>Average Monthly</u>	<u>Frequency</u>	<u>Sample Type</u>
Flow	--	--	Continuous	Report average daily & maximum daily
BOD	--	25% removal	1/week	24-hour Composite
TSS	--	30% removal	1/week	24-hour Composite
pH	6.0 - 8.0 or as naturally occurring		1/day	Grab
Chlorine- TRC	--	--	1/day	Grab
Total Coliform	--	--	1/week	Grab
Oil & Grease	--	--	1/month	Grab

Both treated and untreated ("bypass") flow shall be measured at the treatment facility and reported separately on the Discharge Monitoring Report ("DMR"). The BOD and TSS average monthly percent removals shall be at least 25% and 30% respectively. The average monthly percent removal is to be computed as a running average for twelve months ending with the month being reported. The running average will be calculated commencing with September 1989. Samples for the determination of BOD and TSS percent removal shall be taken of the influent and effluent, allowing for appropriate detention time before sampling the effluent. The depth of sludge in the clarifier shall be measured five times per week and reported monthly. The depth shall be the average of

four measurements at representative points in the clarifier with the results averaged.

FINAL COMPLIANCE

8. On and after February 25, 1992, Portsmouth shall comply with all final effluent limits and monitoring requirements set forth in its applicable NPDES Permit. On and after February 22, 1992, Portsmouth shall not bypass its treatment facility and discharge untreated wastewater unless the bypass is explicitly permitted pursuant to 40 C.F.R. 122.41(m) and then subject to the conditions therein.

COMBINED SEWER OVERFLOWS ("CSOs")

9. The parties to this agreement understand that Portsmouth has been and is currently unable to meet the water quality standards for its combined sewer overflow (CSO) outfalls 010A and 010B, in violation of Portsmouth's NPDES permit and the Act. Furthermore, the parties recognize that dry weather overflows may occur at CSO outfalls 010A and 010B, in violation of Portsmouth's NPDES permit and the Act. Therefore, Portsmouth shall complete the following actions on or before the specified dates, as initial steps towards bringing its CSOs into compliance with its permit and the Act. Plans and schedules submitted under this section may, when approved by the United States Attorney, EPA, and the State, be filed by the United States Attorney, EPA, or the State as a stipulation by Portsmouth and the parties, together with a motion that they be incorporated into this Decree. If Portsmouth fails to make any submission required

under this section to the satisfaction of the United States Attorney, EPA, or the State, then the United States Attorney, EPA, or the State may, in addition to seeking any other relief, submit a proposed schedule or plan to the Court for incorporation into this Decree.

a. The City shall perform a hydraulic analysis of that segment of its sewer system beginning at South Mill Pond and concluding at the Mechanic Street Pumping Station. The purpose of the analysis is to determine the system's capability and capacity to prevent dry weather overflows and CSO discharges. The Report shall be submitted to the United States Attorney, EPA, and the State of New Hampshire by January 1, 1991.

b. A draft CSO Monitoring Plan and Scope of Services ("CSO Plan") to determine the extent of water quality impacts shall be developed and submitted by Portsmouth to the United States Attorney, EPA and the State of New Hampshire for review and approval on or before May 1, 1990. The CSO Plan shall be of sufficient scope to allow development of a facilities plan that assesses a range of alternative CSO abatement measures and dry weather overflows ("DWO") elimination measures. The CSO Plan shall include, but not be limited to, quantity and quality monitoring of CSO discharges, modeling, manpower requirements and their concomitant costs. Portsmouth shall implement the CSO Plan as approved by the U.S. Attorney, EPA, and the State of New Hampshire. In any event, Portsmouth shall measure flow continuously beginning no later than April 1, 1990 at CSOs 010A

and 010B (South Mill Pond) for any dry weather discharges and during storm events; and shall report the results on a monthly basis as part of its Discharge Monitoring Report. The intensity and duration of the storm, as well as the extent and duration of any discharges, shall also be reported and included with the Discharge Monitoring Report.

c. By January 1, 1991, Portsmouth shall submit to the United States Attorney, EPA, and the State for their review and approval, a CSO Facilities Plan which evaluates the specific causes of the dry and wet weather overflows and CSO violations at outfalls 010A and 010B. The CSO Facilities Plan shall recommend corrective measures to eliminate the violations. Portsmouth's CSO Facilities Plan shall include an implementation schedule for achieving water quality standards at its CSO outfalls, and for the elimination of dry weather overflows. Upon receiving written approval of its CSO Facilities Plan and implementation schedule from the United States Attorney, EPA, and the State, Portsmouth shall implement the schedule. Portsmouth may base its proposed implementation schedule on an anticipated approval date with proposed adjustments in the schedule in the event the approval of the United States and the State of New Hampshire has not been obtained by the anticipated date.

d. Portsmouth shall permanently cease any and all dry weather discharges from its CSO outfalls by no later than February 25, 1992, unless (a) both the United States and the State of New Hampshire approve a later date or (b) the Court, in

accordance with the procedures set forth below, establishes a later date for the cessation of dry weather discharges from Portsmouth's CSO outfalls. If, upon submission of the CSO Facilities Plan referred to in paragraph 9.c above, Portsmouth seeks a later date than February 25, 1992 for the termination of dry weather discharges from its CSO outfalls and either the United States or the State of New Hampshire does not approve the later date, the date for Portsmouth's termination of dry weather discharges from its CSO outfalls shall remain February 25, 1992 unless Portsmouth files a petition with the Court for resolution of the dispute within thirty (30) days of receipt of the final disapproval by the United States and/or the State of New Hampshire. The petition shall set out the nature of the dispute with a proposal for its resolution. The United States and/or the State of New Hampshire, whichever disapproves Portsmouth's proposed change in date, will have thirty days in which to respond with its proposal. In any such dispute, Portsmouth shall have the burden of proving that the proposal of the United States and/or the State of New Hampshire, whichever disapproves Portsmouth's proposed change in date, is unreasonable and that Portsmouth's proposal will achieve compliance with the terms and conditions of its NPDES permit, the Act and implementing regulations as expeditiously as possible

e. No later than sixty (60) days after approval by the United States Attorney, EPA and the State of the Report required in paragraph 9.c., supra, Portsmouth shall award the contract for

final design to implement the required corrective measures as outlined in the approved Report. Portsmouth shall notify the United States Attorney, EPA, and the State that such final design has commenced.

f. If by February 1, 1991, the parties are unable to agree on the nature of the CSO abatement projects with regard to Portsmouth's achievement of water quality standards at its CSO outfalls or a schedule for their implementation, then the United States or the State of New Hampshire may move this Court to order that a proposed project, schedule or plan for achievement of water quality standards at Portsmouth's CSO outfalls be incorporated as part of this Modified Decree.

FUNDING

10. Performance of the terms of this Consent Decree by Portsmouth is not contingent on the receipt of any federal or state grant or loan funds or any source of funds. In addition, performance is not excused by the lack of any federal or state grant or loan funds or any other source of funds, nor is performance excused by any delay in the processing of any application for any federal or state grant or loan funds.

REPORTING

11.A. On or before the fifteenth (15th) day of each calendar month, following the calendar month in which this Consent Decree is entered, and continuing until termination of this Decree, Portsmouth shall submit in writing to the United States Attorney for the District of New Hampshire, EPA, the

Department of Environmental Services for the State of New Hampshire, and the New Hampshire Attorney General's Office a report containing the following information:

- a. The status and progress of construction and other projects under this Decree;
- b. The results of sampling, monitoring, testing and evaluation set forth or referred to in paragraphs 7 or 8, as applicable, and 9.b. of this Decree;
- c. A statement as to compliance or non-compliance with each requirement of this Decree, including the construction schedule contained in paragraph 6; the interim or final effluent limits as applicable, and the monitoring, testing and evaluation requirements as applicable in paragraphs 7, 8 and paragraph 9; where there is non-compliance with any provision of this Decree, the report shall include an explanation of such non-compliance, a statement of any corrective action taken or to be taken, and the timing of such corrective action. The report shall also include a projection of the work to be performed pursuant to this Decree during the succeeding six months. The report shall also include the detailing of any change orders submitted by Portsmouth to the State in connection with which the City requests, pursuant to paragraph 6.B, time extension(s) to the deadline in paragraph 6.A.f. not to exceed 12 weeks total, i.e., to no later than

January 22, 1992. Notification to the United States Attorney, EPA and the State of New Hampshire pursuant to this paragraph of any anticipated delay will not excuse the delay.

(d) Portsmouth shall perform the Additional Monitoring Requirements as set forth in Parts I.C and E of its NPDES Permit and report the results thereof.

12. In addition, within ten (10) days immediately following the deadline date of any requirement pursuant to the construction schedule contained in paragraph 6 of this Consent Decree, Portsmouth shall notify the United States Attorney, EPA and the State of New Hampshire, in writing, of compliance or non-compliance with said requirement, the reason(s) for any non-compliance, and a plan for preventing non-compliance in the future.

13. Each report submitted pursuant to paragraphs 11 and 12 above shall be signed by a responsible official of Portsmouth and shall contain the following certification by that officer:

"I certify that the information contained in or accompanying this report is true, accurate, and complete. As to any identified portions of this report for which I cannot personally verify its truth and accuracy, I certify as the official having supervisory responsibility for the person(s) who, acting under my authority, made the verification, that this information is true, accurate and complete."

14. All submissions required by this Consent Decree to be sent by Portsmouth to the United States Attorney, EPA, DES and

the Attorney General of the State of New Hampshire, shall be made in writing to the following addresses, respectively:

United States Attorney
District of New Hampshire
P.O. Box 480
Concord, New Hampshire 03302-0480

Permit Compliance Section (WCC-2103)
U.S. Environmental Protection Agency
Region I
John F. Kennedy Federal Building
Boston, Massachusetts 02203

New Hampshire Office Of The Attorney General
Environmental Protection Bureau
State House Annex
25 Capitol Street
Concord, NH 03301

New Hampshire Department of Environmental Services
Water Quality and Permit Compliance Bureau,
Administrator
Hazen Drive
P.O. Box 95
Concord, New Hampshire 03302-0095

15. The aforementioned reporting requirements do not relieve Portsmouth of its obligation to submit any other reports or information required by the Act, the regulations promulgated under the Act, its applicable NPDES permit or the New Hampshire statute.

FORCE MAJEURE

16. If Portsmouth, or any entity controlled by Portsmouth, including its contractors and consultants, fails to comply with any provision of this Consent Decree, Portsmouth shall notify the Court, the United States Attorney for the District of New Hampshire, EPA, the New Hampshire Department of Environmental Services and the Attorney General of the State of New Hampshire,

in writing within ten (10) days of such non-compliance. The notice shall describe in detail: (a) the anticipated duration of the non-compliance; (b) the precise cause or causes of the non-compliance; (c) the measures taken and prospective measures to prevent or minimize the non-compliance; and (d) the timetable for the implementation of the corrective measures. Portsmouth shall also notify the Court, the United States Attorney, EPA, the New Hampshire Department of Environmental Services and the Attorney General of the State of New Hampshire in accordance with the requirements of this section within ten (10) days of when Portsmouth has reason to believe that non-compliance with any provision of this Consent Decree is likely to occur. Portsmouth shall adopt all reasonable measures to avoid or minimize non-compliance. Failure by Portsmouth to comply with the notice requirements of this paragraph shall render paragraphs 17 through 21 regarding force majeure void and of no effect as to the particular incident involved and shall constitute a waiver of Portsmouth's right to request an extension of time for its obligations under this Consent Decree based on the incident.

17. If the United States and the State of New Hampshire agree that Portsmouth's failure to comply with a provision of this Consent Decree has been or will be caused entirely by circumstances beyond the control of the City of Portsmouth and of any entity controlled by or under the common control of Portsmouth, including Portsmouth's consultants and contractors, and that Portsmouth could not have reasonably foreseen and

prevented such noncompliance, the parties shall stipulate in writing to an extension of time for performance of such requirement, not to exceed the actual delay resulting from such circumstances, and stipulated penalties shall not be due for such delay.

18. If the parties are unable to agree whether Portsmouth's failure to comply with a provision of this Decree was caused entirely by circumstances beyond the control of and without the fault of Portsmouth and of any entity controlled by Portsmouth, or on the number of days of noncompliance that were caused by such circumstances, the matter may be submitted by any party to the Court for resolution. If the Court then determines that the failure to comply was caused entirely by circumstances beyond the control of Portsmouth and of any entity controlled by Portsmouth, including Portsmouth's consultants and contractors, and it is determined that Portsmouth or any entity controlled by Portsmouth could not have foreseen and prevented such noncompliance, and that Portsmouth or any entity controlled by Portsmouth took all reasonable measures to avoid or minimize such noncompliance, Portsmouth shall be excused as to the failure to comply for the period of time the noncompliance continued due to such circumstances.

19. Portsmouth shall bear the burden of proof in establishing that: (a) the non-compliance was caused entirely by circumstances beyond the control of Portsmouth and of any entity controlled by Portsmouth, including its contractors and

consultants; (b) that Portsmouth or any entity controlled by Portsmouth could not have reasonably foreseen and prevented such non-compliance; (c) that Portsmouth or any entity controlled by Portsmouth took all reasonable measures to avoid or minimize such non-compliance and (d) the number of days of non-compliance that were caused by such circumstances.

20. Unanticipated or increased costs or expenses associated with the implementation of actions called for by this Consent Decree or changed financial circumstances or failure to obtain funds or decrease in revenues, shall not, in any event, serve as a basis for changes in this Consent Decree or extensions of time under this Consent Decree.

21. The United States and the State of New Hampshire reserve any and all legal and equitable remedies available to enforce the provisions of this Decree and applicable law.

PENALTY FOR PAST VIOLATIONS

22. Portsmouth shall pay a civil penalty in the amount of \$100,000 to the United States in satisfaction of civil penalty claims for Portsmouth's violations of the Clean Water Act as alleged in the Complaint through the date of entry of this Decree. Within thirty (30) days after the date of entry of this Decree, payment shall be tendered to the United States Attorney for the District of New Hampshire, 55 Pleasant Street, Room 439, Post Office Box 480, Concord, New Hampshire 03302-0480, in the form of a certified check made payable to "Treasurer of the United States of America". In the event of failure to make

timely payment, interest will be charged in accordance with statutory judgment interest rate established pursuant to 28 U.S.C. § 1961 from the time the payment is due until such payment is made. The United States is not precluded from any other remedy available to it to accomplish payment.

STIPULATED PENALTIES

23. The failure of Portsmouth to comply with any requirement of this Decree shall obligate Portsmouth to pay stipulated penalties as follows:

(a) Five hundred dollars (\$500.00) per day per violation for the first thirty (30) days of violation, seven hundred and fifty dollars (\$750.00) per day per violation for the next thirty (30) days, and one thousand dollars (\$1,000.00) per day per violation for any days beyond sixty (60) days for each violation of a deadline date in the construction schedule set forth in paragraph 6 of this Decree.

(b) Three hundred dollars (\$300.00) per day for each violation by Portsmouth of each and any daily maximum discharge limit set forth or referenced in paragraphs 7 or 8 of this Decree.

(c) Two thousand dollars (\$2,000.00) per month per violation for each violation of each and any average monthly effluent limit set forth or referenced in paragraphs 7 or 8.

(d) One thousand dollars (\$1,000.00) per day for each violation of the bypass prohibition set forth in paragraph 8.

(e) Two hundred and fifty dollars (\$250.00) per day for each failure to properly and timely submit notifications, reports or plans (other than the CSO Facilities Plan covered by 9(f)) or perform sampling or fulfill monitoring obligations as required under this Consent Decree.

(f) One thousand dollars (\$1,000.00) per day for failure to properly and timely submit the CSO Facilities Plan required under paragraph 9.c. of this Consent Decree.

(g) One thousand dollars (\$1,000.00) per day for each violation of the dry weather discharge prohibition set forth in paragraph 9.d. of this Consent Decree.

24. Stipulated penalties shall be paid automatically without demand on or before the fifteenth (15th) day of the month following the month in which the violation(s) occurred. The payment shall be made by certified check, payable to "Treasurer of the United States of America" and tendered to the United States Attorney for the District of New Hampshire, 55 Pleasant Street, Room 439, P.O. Box 480, Concord, New Hampshire 03302-0480. Each such check shall be accompanied by a letter describing the basis for each penalty. Copies of all such letters shall also be mailed to the Environmental Protection Agency and the State.

25. In the event that a stipulated penalty is not paid on time, as required by the preceding paragraph, such penalty shall be subject to interest at the statutory judgment rate established pursuant to 28 U.S.C. § 1961 from the date the penalty was due until payment is made.

RIGHT OF ENTRY

26. Until termination of the provisions of this Consent Decree, the United States Attorney, EPA, the State of New Hampshire and their representatives including the Department of Environmental Services ("DES"), contractors and consultants and attorneys for the United States and State of New Hampshire, shall have the authority to enter any facility covered by this Decree,

at all times, upon proper presentation of credentials, for the purposes of:

- (a) monitoring the progress of activities required by this Decree;
- (b) verifying any data or information submitted in accordance with the terms of this Decree;
- (c) obtaining any samples or, on request, splits of any samples taken by Portsmouth or its consultants; and
- (d) assessing Portsmouth's compliance with this Decree.

This provision in no way limits or otherwise affects any right of entry held by the United States or the State of New Hampshire pursuant to applicable federal or state laws, regulations or permits.

NOT A PERMIT

27. This Decree is not and shall not be interpreted to be a permit or a modification of Portsmouth's NPDES Permit, issued pursuant to section 402 of the Clean Water Act, 33 U.S.C. § 1342, or State statute or permit, nor shall it in any way relieve Portsmouth of its obligation to obtain permits and comply with the requirements of any applicable discharge permit or with any other federal or state law or regulation. Any new permit or modification of its existing permit, must be complied with by Portsmouth in accordance with applicable federal and state laws and regulations.

OBLIGATION TO COMPLY

28. The pendency of any proceedings concerning the issuance, reissuance or modification of any discharge permit shall not affect, postpone, or diminish Portsmouth's duties and liabilities as set forth in this Consent Decree. Furthermore, notwithstanding any other provisions of this Decree, the obligation to achieve and maintain complete compliance with the terms, provisions, and requirements of this Decree, the Act and the applicable regulations and permits rests solely with the City of Portsmouth.

NON-WAIVER PROVISION

29. By this Decree, neither the United States nor the State of New Hampshire waive any rights or remedies available to it for any violation by Portsmouth of the Act and associated regulations or permit conditions. Furthermore, this Decree in no way affects the ability of the United States or the State of New Hampshire to bring an action for further relief pursuant to federal or state law for any violations not specifically alleged in the Complaint. This Decree in no way affects or relieves Portsmouth of responsibility to comply with any other federal, state or local laws or regulations.

30. Nothing herein shall be construed to limit the power of the United States, or the State of New Hampshire consistent with their respective authorities to undertake any action against any person, including Portsmouth, in response to conditions which may

present an imminent and substantial endangerment to the public health, welfare or the environment.

COST OF SUIT

31. Portsmouth, the United States and the State of New Hampshire shall each bear its own costs and attorney's fees in this action. Should Portsmouth violate the terms and conditions of this Decree, then Portsmouth shall be liable to the United States for any costs and attorney's fees incurred by the United States in any actions against Portsmouth for non-compliance with this Consent Decree and, similarly, Portsmouth shall be liable to the State of New Hampshire for any costs and attorney's fees incurred by the State of New Hampshire in any actions against Portsmouth for non-compliance with the Consent Decree.

PUBLIC COMMENT

32. The parties agree and acknowledge that final approval by the United States and entry of this Decree is subject to the requirements of 28 C.F.R. § 50.7, which provides for notice and opportunity for public comment. Portsmouth and the State consent to the entry of this Decree without further notice. The United States consents to the entry of this Decree, subject to publication of notice thereof in the Federal Register, pursuant to 28 C.F.R. § 50.7, and an opportunity to consider comments thereon.

SEVERABILITY

33. The provisions of this Consent Decree shall be severable. Should any provision be declared by a court of

competent jurisdiction to be inconsistent with federal or state law, and therefore unenforceable, the remaining provisions of this Decree shall remain in full force and effect.

RETENTION OF JURISDICTION

34. The Court shall retain jurisdiction to enforce, including by contempt order, the terms and conditions of this Consent Decree, to make modifications necessary to effectuate compliance with the Act, this Decree, applicable NPDES permits, and any applicable federal regulations and to resolve all disputes arising hereunder as may be necessary for the construction or execution of this Decree.

TERMINATION OF THIS DECREE

35. When Portsmouth has paid all outstanding penalties, completed all remedial measures specified herein, and achieved full compliance with all requirements, including the final effluent limits of its applicable NPDES Permit, for a period of one year continuously to the satisfaction of the United States Attorney, Environmental Protection Agency, and State of New Hampshire, then any party may move for termination of this Decree.

JUDGMENT IS HEREBY ENTERED IN ACCORDANCE WITH THE FOREGOING
CONSENT DECREE THIS _____ DAY OF _____, 1989.

Dated: _____

United States District Judge

CONSENTED TO:

FOR THE UNITED STATES OF AMERICA:

Dated: November 14, 1990

Jeffrey R. Howard
JEFFREY R. HOWARD
United States Attorney
District of New Hampshire
P.O. Box 480
Concord, NH 03302-0480

Dated: 11.11.90

Richard B. Stewart
Richard B. Stewart
Assistant Attorney General
Land & Natural Resources Division
U.S. Department of Justice
10th & Pennsylvania Ave., NW
Washington, DC 20530

Dated: November 14, 1990

Nancy E. Hart
Nancy E. Hart
Assistant U.S. Attorney
District of New Hampshire
P.O. Box 480
Concord, NH 03302-0480

Dated: November 5, 1990

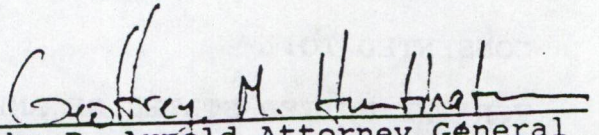
James M. Strock
James M. Strock
Assistant Administrator For
Enforcement and Compliance
Monitoring
Environmental Protection Agency
401 "M" Street
Washington, DC 20460

Dated: 6/14/90

Joshua Secunda
Joshua Secunda, Assistant Regional
Counsel
Environmental Protection Agency
Region I
JFK Federal Building
Boston, MA 02203-2211

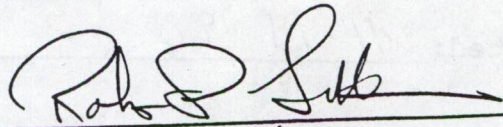
FOR THE STATE OF NEW HAMPSHIRE:

Dated: May 28, 1990

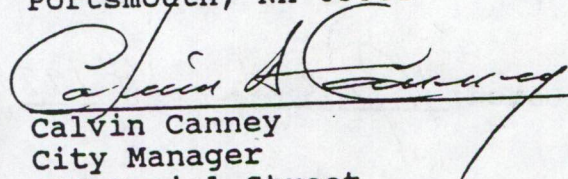

 John P. Arnold Attorney General
 State of New Hampshire by
 Geoffrey Huntington
 Assistant Attorney General
 State of New Hampshire
 25 Capitol Street
 Concord, NH 03301

FOR THE CITY OF PORTSMOUTH, NEW HAMPSHIRE:

Dated: May 15, 1990


 Robert P. Sullivan
 City Attorney
 126 Daniel Street
 Portsmouth, NH 03801

Dated: 5/15/90


 Calvin Canney
 City Manager
 126 Daniel Street
 Portsmouth, NH
 Pursuant to authority delegated by
 the City Council of the City of
 Portsmouth



"Flynn, Peter (ENRD)"
<PFlynn@ENRD.USDOJ.GOV>
V>

09/24/2009 10:23 AM

To Edie Goldman/R1/USEPA/US@EPA, Michael
Wagner/R1/USEPA/US@EPA, Joy
Hilton/R1/USEPA/US@EPA
cc "Gluck, Ronald (ENRD)" <RGluck@ENRD.USDOJ.GOV>

bcc

Subject FW: Activity in Case 1:09-cv-00283-PB USA v. Portsmouth,
NH, City of Order on Motion to Approve Consent Decree

History:

This message has been forwarded.

Portsmouth consent decree was approved 6 calendar days before the end of FY 2009; success!

From: Flynn, Peter (ENRD)

Sent: Thursday, September 24, 2009 10:21 AM

To: E Tupper Kinder; Suzanne M. Woodland; 'Noether, Lauren'; wagner.michael@epamail.epa.gov;
'Plourde, David (USANH)'

Subject: FW: Activity in Case 1:09-cv-00283-PB USA v. Portsmouth, NH, City of Order on Motion to
Approve Consent Decree

Below is the docket entry from the court granting the motion to approve the consent decree. Pursuant
to par. 64 of the consent decree, therefore, Sept 24th is the effective date of the consent decree. We
will attempt to obtain the judge's signature on the consent decree (good to have for our files), however,
the consent decree was drafted to cover the situation where the court grants the motion to approve
the consent decree but doesn't actually sign the document.

From: ecf_bounce@nhd.uscourts.gov [mailto:ecf_bounce@nhd.uscourts.gov]

Sent: Thursday, September 24, 2009 9:07 AM

To: nef@nhd.uscourts.gov

Subject: Activity in Case 1:09-cv-00283-PB USA v. Portsmouth, NH, City of Order on Motion to Approve
Consent Decree

**This is an automatic e-mail message generated by the CM/ECF system. Please DO NOT
RESPOND to this e-mail because the mail box is unattended.**

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charges, download a copy of each document during this first viewing. However, if the
referenced document is a transcript, the free copy and 30 page limit do not apply.

U.S. District Court

District of New Hampshire

Notice of Electronic Filing

The following transaction was entered on 9/24/2009 at 9:06 AM EDT and filed on 9/24/2009

Case Name: USA v. Portsmouth, NH, City of
Case Number: 1:09-cv-283
Filer:
Document Number: No document attached

Docket Text:

ENDORSED ORDER granting [7] Motion to Approve Consent Decree. Text of Order: Granted. So Ordered by Judge Paul J. Barbadoro. (jna)

1:09-cv-283 Notice has been electronically mailed to:

E. Tupper Kinder ekinder@nkms.com, sauger@nkms.com

Mary E. Maloney mary.maloney@doj.nh.gov, jane.watt@doj.nh.gov,
manuela.perry@doj.nh.gov

Peter M. Flynn peter.flynn@usdoj.gov

1:09-cv-283 Notice, to the extent appropriate, must be delivered conventionally to:



"Flynn, Peter (ENRD)"
<PFlynn@ENRD.USDOJ.GO
V>

09/18/2009 02:00 PM

To Michael Wagner/R1/USEPA/US@EPA, Joy
Hilton/R1/USEPA/US@EPA

cc

bcc

Subject Portsmouth - Joy Declaration

Mike and Joy,

Thanks for drafting the documents. Only have a minor change for Declaration. Since the consent decree was not signed by the judge and entered by the court until Feb 1991, I refer to it as the 1991 consent decree (instead of the 1990 consent decree). Also, they must have changed assigned judges after the complaint was filed, so it was signed by Judge Norman Stahl and someone handwrote an "S" instead of a "D" on the caption. So please also change that (ie, 89-234-S instead of 89-234-D).

Pete

Hilton, Joy (Palmer)

From: Michael Wagner [wagner.michael@epamail.epa.gov]
Sent: Tuesday, February 19, 2013 2:14 PM
To: Hilton, Joy (Palmer)
Subject: Fw: Portsmouth - mostly good news
Attachments: ENV_ENFORCEMENT-#2333052-v1-
Portsmouth_Order_entering_consent_decree_modification_2_15_13.PDF

----- Forwarded by Michael Wagner/R1/USEPA/US on 02/19/2013 02:14 PM -----

From: "Flynn, Peter (ENRD)" <Peter.Flynn@usdoj.gov>
To: Michael Wagner/R1/USEPA/US@EPA, "Plourde, David (USANH)" <David.Plourde@usdoj.gov>
Date: 02/15/2013 03:28 PM
Subject: Portsmouth - mostly good news

Court entered consent decree modification and issued a 16 page opinion; see enclosed. That is great news. Somewhat troubling is that court appears to apply a more stringent analysis for modifying a consent decree than for entering an original consent decree. (See attached file: ENV_ENFORCEMENT-#2333052-v1-Portsmouth_Order_entering_consent_decree_modification_2_15_13.PDF)

Inter-Office Memorandum

Subject: [Illegible]

Date: [Illegible]

From: [Illegible]

To: [Illegible]

Re: [Illegible]

[Illegible]

[Illegible]

[Illegible]

[Illegible]

[Illegible]

[Illegible]

[Illegible]

[Illegible]

[Illegible]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

United States of America, et al.

v.

Case No. 09-cv-283-PB
Opinion No. 2012 DNH 021

City of Portsmouth, New Hampshire

MEMORANDUM AND ORDER

The United States has filed a motion to modify a consent decree that addresses the City of Portsmouth's failure to abide by the Clean Water Act and the New Hampshire Water Pollution and Waste Disposal Act. All of the parties to the consent decree support the proposed modification but the Conservation Law Foundation ("CLF") has intervened and filed an objection. In this Memorandum and Order, I explain why I overrule CLF's objection and approve the proposed modification to the consent decree.

I. BACKGROUND

A. The Complaints

On August 8, 2009, the United States filed a complaint alleging that the City of Portsmouth ("Portsmouth") violated several sections of the Clean Water Act ("CWA"), 33 U.S.C. §

1251, et seq. Doc. No. 1. On September 9, 2009, New Hampshire intervened in the action and filed a complaint alleging that Portsmouth violated the New Hampshire Water Pollution and Waste Disposal Act, N.H. Rev. Stat. Ann. § 485-A:13 (2013). Doc. No. 4. The complaints allege that the City violated both permit effluent limitations for discharges from the City's Pierce Island wastewater treatment plant and permit conditions applicable to discharges from overflow points in the City's combined wastewater collection system.

B. The Consent Decree

The United States filed a proposed consent decree with its complaint. The consent decree requires Portsmouth to take several steps to bring its wastewater treatment practices into compliance with the Clean Water Act. For example, the decree requires Portsmouth to implement a compliance plan, develop and implement a wastewater master plan, perform combined sewer overflow facility upgrades, comply with interim emissions/effluent limits until the secondary treatment facilities achieve full operation, submit and comply with a post construction monitoring plan, and comply with reporting

requirements. Portsmouth has already taken some of these steps. It is working toward accomplishing the others.

Two requirements are relevant to the proposed modification. Those requirements are: (1) that Portsmouth must undertake a series of projects, to be completed before October 2013, to upgrade sewer overflow facilities and reduce the frequency and volume of combined sewer overflow; and (2) that Portsmouth must submit a construction schedule for secondary wastewater treatment facilities by June 2010. Doc. No. 8.

C. Proposed Consent Decree Modification

On July 2, 2012, the United States lodged a proposed consent decree modification with the court. A notice was published in the Federal Register on July 18, 2012, announcing the consent decree modification. Coastal Conservation Association of New Hampshire and CLF submitted comments during the ensuing public comment period.

The proposed modification contains two main provisions. First, it extends the schedule for completion of the combined sewer overflow upgrades from October 2013 to October 2014. The parties agreed to this modification because Portsmouth encountered unexpected geological conditions that prevented the

City from meeting the original construction schedule and because local budget procedures prevented the City from allocating adequate financial resources to commence secondary pilot testing. Second, it establishes a construction schedule for the secondary treatment facilities, as required by the original decree. The second provision is not actually a modification of the consent decree, but is instead a required addition to the original decree. Portsmouth submitted a proposed schedule in June 2010, and, after further submissions and negotiations, the EPA, New Hampshire Department of Environmental Services ("NHDES"), and Portsmouth agreed on a construction schedule that provides for construction of secondary treatment facilities to be completed and compliance with secondary treatment limits to be achieved by May 2017.

D. CLF Objection

CLF filed an objection to the United States' motion to enter the consent decree modification. CLF does not object to either of the two main provisions of the consent decree modification. Instead, it argues that Portsmouth's past failures in complying with the Clean Water Act require the court to more closely monitor the EPA's management of the consent decree. In

particular, it proposes that I require the parties to file quarterly reports and attend status conferences and compliance hearings.

II. STANDARD OF REVIEW

When evaluating a proposed consent decree, the court determines whether the proposed decree is "fair, reasonable, and faithful to the objectives of the governing statute." United States v. Cannons Eng'g Corp., 899 F.2d 79, 84 (1st Cir. 1990). The court does not consider whether the settlement is one the court would have reached or whether the court thinks the settlement is ideal. Id. The First Circuit has consistently recognized a strong and clear policy in favor of encouraging settlements, especially in complicated regulatory settings. See United States v. Comunidades Unidas Contra La Contaminacion, 204 F.3d 275, 280 (1st Cir. 2000); Conservation Law Found. of New England, Inc. v. Franklin, 989 F.2d 54, 59 (1st Cir. 1993); Durrett v. Hous. Auth. of City of Providence, 896 F.2d 600, 604 (1st Cir. 1990); Cannons Eng'g, 899 F.2d at 84. That policy is even stronger where the consent decree has been advanced by a "government actor 'committed to the protection of the public

interest' and specially trained and oriented in the field." Comunidades Unidas, 204 F.3d at 280 (quoting Cannons Eng'g, 899 F.2d at 84). In reviewing a settlement involving a government agency, "the district court must exercise some deference to the agency's determination that settlement is appropriate." Conservation Law Found., 989 F.2d at 58.

Different rules apply when a party seeks to modify an existing consent decree. Federal Rule of Civil Procedure 60(b)(5) allows a district court to modify a consent decree when it is no longer equitable that the judgment should have prospective application.

In United States v. Swift & Co., the Supreme Court held that a party seeking to modify a consent decree must make a "clear showing of grievous wrong." 286 U.S. 106, 119 (1932). Almost sixty years later, in Rufo v. Inmates of the Suffolk Cnty. Jail, the Supreme Court revisited the issue in the context of institutional reform litigation and recognized the need for "a less stringent, more flexible standard" than the standard articulated in Swift. 502 U.S. 367, 380 (1992). In Rufo, the Court observed that a consent decree modification may be warranted "when changed factual conditions make compliance with

the decree substantially more onerous . . . when a decree proves to be unworkable because of unforeseen obstacles . . . or when enforcement of the decree without modification would be detrimental to the public interest." Id. at 384 (citations omitted). Rufo instructed district courts to "exercise flexibility in considering requests for modification of ... institutional reform consent decree[s]," id. at 383, because such decrees impact the public's right to "the sound and efficient operation of its institutions." Id. at 381.

Rufo established a two-prong test that a party must meet to modify a consent decree. First, the party seeking the modification must establish that a significant change in facts or law warrants revision of the decree. Id. at 383. If the moving party meets the first prong, the court considers whether the proposed modification is suitably tailored to the changed circumstances. Id. If both prongs are satisfied, the district court may approve the consent decree modification.

The First Circuit has not confined the Rufo holding to institutional reform litigation and has avoided strictly classifying cases to determine the applicable standard. Alexis Lichine & Cie v. Sacha A. Lichine Estate Selections, Ltd., 45

F.3d 582, 586 (1995). Instead, the First Circuit has held that the two standards should be viewed not as "a limited dualism but as polar opposites of a continuum in which we must locate the instant case." Id. On one end of the continuum are consent decrees protecting "rights fully accrued upon facts so nearly permanent as to be substantially impervious to change" (as illustrated by Swift). Id. On the other end of the continuum are decrees involving "the supervision of changing conduct or conditions and thus provisional and tentative" (as illustrated by Rufo). Id. (quoting Rufo, 502 U.S. at 379).

III. ANALYSIS

There are two main provisions of the proposed consent decree modification: (1) the provision extending the schedule for completion of the combined sewer overflow ("CSO") upgrades from October 2013 to October 2014; and (2) the provision establishing a construction schedule for the secondary wastewater treatment facilities. The first provision modifies the existing consent decree. The second provision does not change any provision in the existing decree. Instead, it merely fulfills a commitment that the parties made in the original

decree to submit a construction schedule for the secondary treatment facilities. In this sense, the second provision is more like a new consent decree than a modification to an existing decree. Accordingly, I analyze the first provision using the standard for approving a consent decree modification and the second using the standard for initially approving a consent decree.

A. First Provision: Modifying the Completion Deadline for Sewer Overflow Upgrades

Rufo instructed district courts to exercise flexibility when considering a request to modify an institutional reform decree because such decrees "reach beyond the parties involved directly in the suit and impact on the public's right to the sound and efficient operation of its institutions." 502 U.S. at 381 (quoting Heath v. De Courcy, 888 F.2d 1105, 1109 (6th Cir. 1989)). A similarly flexible standard is appropriate in this case because public entities and the environment are involved. Accordingly, I apply the Rufo standard in evaluating the first of the two proposed modifications.

The United States seeks to modify the consent decree by extending the schedule for sewer upgrades by one year arguing that significant changes in factual circumstances warrant

revision of the decree. The United States offers two factual changes to justify the one-year extension: (1) Portsmouth encountered unexpected geological conditions that impaired the City's ability to meet the original construction schedule; and (2) Portsmouth's local budget procedures required the City to reallocate resources from the sewer upgrades to maximize the earliest environmental improvement.

The unexpected geological condition was that Portsmouth was required to remove a larger volume of rock than initially anticipated. Rock removal proceeded slowly because the projects are located in densely populated neighborhoods with older homes; there are high pressure gas vaults and mains in the street; and the contractors had to remove the rocks by mechanical means instead of blasting. The EPA reviewed the information Portsmouth provided and agreed that these geological conditions impaired Portsmouth's ability to meet the initial schedule.

Local budget procedures also required Portsmouth to redirect funds from the sewer upgrade project to the testing of secondary treatment facilities. The EPA agreed with the City that redirecting funds from the sewer upgrade project to the testing of secondary facilities would maximize the earliest

environmental improvement and merited a change in the schedule.

These changed factual circumstances satisfy the first prong of the Rufo test. As the Court explained in Rufo, modification is "appropriate when a decree proves to be unworkable because of unforeseen obstacles." 502 U.S. at 384. Here, the volume of rock is an unforeseen obstacle. CLF has not suggested that any of the parties anticipated the volume of rock later found at the sites. Modification is also appropriate when enforcement of the decree without modification would be detrimental to the public interest. Id. Here, Portsmouth and the EPA agreed that, given budget constraints, it was in the environmental interest to prioritize funding secondary treatment facility testing before the sewer upgrade project. CLF has offered no reason to question this judgment.

After finding that a change of facts occurred which merit revision of the decree, I next consider whether the proposed modification is suitably tailored to those changed circumstances. Again, CLF offers no reason to question the suitability of the proposed modification. "[O]nce a court has determined that a modification is warranted . . . principles of federalism and simple common sense require the court to give

significant weight to the views of the local government officials who must implement any modification." Id. at 393 n.14. The EPA and Portsmouth determined that the one-year extension of the CSO mitigation schedule is suitably tailored to the changed circumstances. The parties' view merits "significant weight" at the second prong of the Rufo analysis. See id. I find that the proposed modification is suitably tailored to the changed circumstances.

Accordingly, I approve the modification under the Rufo standard.

B. Second Provision: Establishing a Construction Schedule for Secondary Wastewater Treatment Facilities

The second provision of the proposed consent decree modification establishes a construction schedule for the secondary wastewater treatment facilities. Because this provision creates additional requirements beyond those in the existing consent decree, and is therefore not actually a modification, I analyze it using the standard for approval of a consent decree. When evaluating a consent decree, the court must determine whether the proposed decree is "fair, reasonable, and faithful to the objectives of the governing statute."

Cannons Eng'g, 899 F.2d at 84.

The fairness of a proposed consent decree includes both procedural and substantive fairness. See id. at 86. To measure procedural fairness, I "look to the negotiation process and attempt to gauge its candor, openness, and bargaining balance." See id. Here, the provision establishing a construction schedule is procedurally fair because the parties negotiated it at arm's length, with adequate information and reports, and were represented by counsel. See id. A consent decree is substantively fair if it is "based upon, and roughly correlated with, some acceptable measure of comparative fault, apportioning liability among the settling parties according to rational (if necessarily imprecise) estimates of how much harm each P[otentially] R[esponsible] P[arty] has done." See id. at 87. The EPA determination of substantive fairness should be upheld "so long as the agency supplies a plausible explanation for it." Id. Because concepts of corrective justice and accountability are not easily quantified in environmental cases, I defer to the EPA's expertise when weighing substantive fairness. See City of Bangor v. Citizens Commc'n Co., 532 F.3d 70, 97 (1st Cir. 2008); Cannons Eng'g, 899 F.2d at 88.

The construction schedule is also reasonable. Courts have found consent decrees to be reasonable when they provide for short- and long-term equipment improvements, detailed compliance schedules, fulfillment of contractual obligations, and reporting requirements. See Comunidades Unidas, 204 F.3d at 281. The court does not examine the reasonableness of the proposed consent decrees for "mathematical precision," but instead defers to the EPA's judgment on whether the consent decree is reasonable. United States v. Davis, 261 F.3d 1, 26 (1st Cir. 2001); Cannons Eng'g, 899 F.2d at 90. Here, the relief is tailored to redressing the injuries alleged in the complaint. See Comunidades Unidas, 204 F.3d at 281. The construction schedule for the secondary treatment facilities is reasonable.

Finally, the construction schedule is also faithful to the objectives of the Clean Water Act. CLF simply points to the past delays by Portsmouth in complying with its obligations under the Clean Water Act and asserts that Portsmouth and the EPA have failed to act with the "urgency warranted by the circumstances." Doc. No. 23-1. The construction schedule seeks to bring Portsmouth into compliance with the Act. The court defers to the judgment of the EPA that the consent decree is

consistent with the objectives of the Clean Water Act. Comunidades Unidas, 204 F.3d at 280 (finding a strong presumption in favor of entering consent decrees advanced by government agencies that are "committed to the protection of the public interest and specially trained and oriented in the field") (internal quotations omitted). CLF has not suggested that the construction schedule is contrary to the objectives of the Act and has not provided any reason to question the EPA's judgment on this matter.

Accordingly, I conclude that the proposed construction schedule is "fair, reasonable, and faithful to the objectives of the governing statute." See Cannons Eng'g Corp., 899 F.2d at 84.

C. Additional Oversight Not Required at This Time

CLF proposes that I require the parties to file quarterly reports and attend status conferences and compliance hearings. I conclude that such oversight is not required at this time. The parties have not requested additional oversight and CLF does not provide sufficient justification to require additional oversight. On its own, Portsmouth's delay in complying with the Clean Water Act before the consent decree was approved does not

justify additional oversight. There is no reason to believe that Portsmouth is unreasonably delaying compliance with the current consent decree. I deny CLF's motion without prejudice to its right to petition for greater oversight in the future if the parties seek to modify other deadlines or otherwise cause undue delay.

IV. CONCLUSION

For the reasons set forth in this order, I approve the consent decree modification offered by the parties. Doc. No. 10-1.

SO ORDERED.

/s/Paul Barbadoro
Paul Barbadoro
United States District Judge

February 15, 2013

cc: Peter M. Flynn
Mary E. Maloney
E. Tupper Kinder
Thomas F. Irwin

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
STATE OF NEW HAMPSHIRE,)	
)	
Plaintiff-Intervenor,)	CIVIL ACTION
)	NO. 09-cv-283-PB
)	
v.)	
)	
CITY OF PORTSMOUTH, NEW HAMPSHIRE,)	
)	
Defendant.)	
)	

CONSENT DECREE MODIFICATION

WHEREAS, Plaintiff, the United States of America ("United States"), on behalf of the United States Environmental Protection Agency ("EPA"), filed a Complaint in this action alleging that Defendant, the City of Portsmouth, New Hampshire ("the City") violated Section 301(a) of the Clean Water Act ("CWA"), 33 U.S.C. § 1301(a).

WHEREAS, Plaintiff-Intervenor, the State of New Hampshire ("State"), filed a Complaint-in-Intervention alleging that the City violated the New Hampshire Water Pollution and Waste Disposal Act, NH RSA 485-A ("New Hampshire Act");

WHEREAS, The Complaint and Complaint-in-Intervention allege that the City is violating its National Pollutant Discharge Elimination System ("NPDES") permit effluent limitations for discharges from the City's wastewater treatment plant and permit

conditions applicable to discharges from overflow points in the City's combined wastewater collection system;

WHEREAS, the Court entered the Consent Decree ("Consent Decree") in this matter on September 24, 2009, requiring combined sewer overflow ("CSO") mitigation and construction of secondary treatment facilities;

WHEREAS, the City encountered unexpected geological conditions that impairs the City's ability to meet the previously-designated CSO mitigation construction schedule;

WHEREAS, the City demonstrated that necessary work related to constructing secondary treatment facilities warrants a change in the CSO mitigation construction schedule;

WHEREAS, the City also proposes a detailed schedule for constructing secondary treatment facilities in accordance with this Consent Decree; and

WHEREAS, the United States, State and City (the "Parties") agree, and the Court by entering this Consent Decree Modification ("Modification") finds, that this Modification is fair, reasonable and in the public interest;

NOW, THEREFORE, it is hereby Ordered, Adjudged, and Decreed that:

1. The Court has jurisdiction over the subject matter of this action and over the Parties to this Modification pursuant to Paragraphs 1 and 65 of the Consent Decree.

2. Pursuant to Paragraph 66 of the Consent Decree material modifications of the Consent Decree may be made by written agreement of the Parties, and shall be effective only upon approval of the Court.
3. The following Paragraph is hereby substituted for Paragraph 10 of the Consent Decree:

Combined Sewer Overflow Facility Upgrades. The City shall implement its April 2005 Final CSO Long Term Control Plan in accordance with the following schedule and shall complete all construction for implementation of the 2005 LTCP projects listed below by October, 2014:

Planning Area I.D.	Contract I.D.	Project Start Date	Project Completion Date
Lincoln 3	Phase I	In Progress	6/1/2012
Lincoln 3	Phase II	In Progress	10/1/2014
Lincoln 3	Phase III	In Progress	10/1/2013
Islington	Islington #2	Under Design	6/1/2013

4. Paragraph 20.a. of the Consent Decree shall be replaced with the following Paragraph:

Within 30 days after the end of each calendar quarter (i.e., by April 30, July 30, October 30, and January 30) after the Effective Date of this Consent Decree, until termination of this Decree pursuant to Section XVI, the City shall submit a written report for the preceding calendar quarter that shall include a description of the following: i) the status of any construction or compliance measures, including whether any such construction or compliance measure could be completed prior to relevant milestones contained herein consistent with sound engineering practice and normal construction practices; ii) the status of all Consent Decree milestones, including whether any have been achieved prior to the date for doing so; iii) any problems encountered or anticipated, together with the proposed or implemented solutions; iv) the status of permit applications; v) operation and maintenance operations; and vi) reports to State agencies.

5. Paragraph 1 of Appendix B.1 to the Consent Decree is hereby modified by adding the following subparagraphs:

g. By June 30, 2012, the City shall complete pilot testing of potential treatment technologies for achieving secondary treatment, including, but not necessarily limited to: Biologically Aerated Filters (BAF), BioMag, Moving Bed Biofilm Reactors (MBBR) w/ Dissolved Air Flotation (DAF), and Conventional Activated Sludge with BioMag. By July 30, 2012, the City shall complete a data summary relative to the pilot testing.

h. By October 1, 2012, the City shall submit a Piloting Technical Memorandum that includes data from piloting and a recommendation on the design and capacity of secondary treatment facilities.

i. By July 1, 2013, the City shall commence final design of secondary treatment facilities.

j. By August 31, 2014, the City shall complete design of secondary treatment facilities.

k. By March 1, 2015, the City shall commence construction of secondary treatment facilities.

l. By March 1, 2017, the City shall complete construction of secondary treatment facilities.

m. By May 1, 2017, the City shall achieve compliance with secondary treatment limits in the Permit.

n. Whenever feasible, the City shall commence work in advance of milestones and complete such work as expeditiously as practicable consistent with sound engineering practice and normal construction practices.

6. This Modification shall be lodged with the Court for a period of not less than thirty (30) days for public notice and comment in accordance with 28 C.F.R. Section 50.7. The United States reserves the right to withdraw or withhold its consent if the comments regarding the Modification disclose facts or considerations indicating that the Modification is inappropriate, improper, or

inadequate. The City consents to entry of this Modification without further notice and agrees not to withdraw from or oppose entry of this Modification by the Court or to challenge any provision of the Modification, unless the United States has notified the City in writing that it no longer supports entry of this Modification.

7. The Effective Date of this Modification shall be the date upon which this Modification is entered by the Court or a motion to enter the Modification is granted, whichever occurs first, as recorded on the Court's docket.

Dated and entered this _____ day of _____, 2012.

UNITED STATES DISTRICT JUDGE
District of New Hampshire

FOR PLAINTIFF THE UNITED STATES OF AMERICA:

Respectfully submitted,

FOR THE UNITED STATES

IGNACIA S. MORENO
Assistant Attorney General
Environmental & Natural Resources Division
United States Department of Justice

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JOHN P. KACAVAS
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District of New Hampshire

Dated _____

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For the UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Mark Pollins
Director
Water Enforcement Division
Office of Enforcement and Compliance Assurance
United States Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

DATE

For the UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, REGION I

Susan Studlien
Director, Office of Environmental Stewardship
United States Environmental Protection Agency,
Region I
5 Post Office Square – Suite 100
Boston, Massachusetts 02114
studlien.susan@epa.gov

DATE

For Plaintiff, the State of New Hampshire

State of New Hampshire
Department of Environmental Services

By its attorneys,
Orville B. Fitch II
Deputy Attorney General
Acting Attorney General

By: _____
Lauren J. Noether, NH Bar 1881
Senior Assistant Attorney General
Environmental Protection Bureau
33 Capitol Street
Concord, NH 03301
603/271-3679

For Defendant, the City of Portsmouth, New Hampshire

By: _____
John P. Bohenko, City Manager
Pursuant to vote of the City Council
of _____, 2012.



"Flynn, Peter (ENRD)"
<PFlynn@ENRD.USDOJ.GOV>
V>

08/14/2009 05:03 PM

To Joy Hilton/R1/USEPA/US@EPA
cc Michael Wagner/R1/USEPA/US@EPA
bcc

Subject Portsmouth motion to terminate

Joy,

Planning ahead. When we move to enter the consent decree in late Sept we will also ask the court to terminate the 1990 consent decree. As part of the court filings we will need to include a declaration from you essentially verifying that Portsmouth has complied with the requirements of the 1990 consent decree (which is our basis for asking the court to terminate that consent decree). I will be on vacation starting on Monday, Aug 31st and will return to my office on Sept 14th. It would be great if Mike and you could prepare this declaration so it is completed, at least in draft form, by Sept 14th.

Pete

Cc: Mike

**UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE**

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	
)	
CITY OF PORTSMOUTH, NEW HAMPSHIRE,)	DECLARATION OF JOY HILTON
)	
Defendant.)	
)	

JOY HILTON, pursuant to 28 U.S.C. § 1746, declares the following under penalty of perjury:

1. I submit this declaration in support of the Motion of the United States of America to terminate the 1991 Consent Decree (Civil Action No. 89-234-S). Except where noted otherwise, I have personal knowledge of the information set forth herein.
2. I am employed by the United States Environmental Protection Agency, Region I ("EPA") as an Environmental Engineer in the Water Compliance Section of the Office of Environmental Stewardship. I have been employed at EPA since December 1983. I graduated from the University of Massachusetts-Amherst with a Bachelor of Science degree in Civil Engineering in February 1977.
3. Prior to my employment at EPA, I was employed by Teledyne Engineering Services in Waltham, Massachusetts and, before that, by ITT Grinnell in Providence, Rhode Island as a structural engineer.
4. As an Environmental Engineer at EPA, I am responsible for, among other things, conducting inspections of facilities, reviewing discharge monitoring data and other reports to determine compliance with the Clean Water Act, 33 U.S.C. § 1251 et seq., and drafting documents relating to Clean Water Act ("CWA" or "Act") enforcement. Additionally, I track compliance with formal enforcement action requirements and review and comment on documents submitted as required by the action.

5. I am responsible for tracking compliance by the City of Portsmouth, New Hampshire ("City's" or "Portsmouth's") with the 1991 Consent Decree Civil Action No. 89-234-S ("1991 Consent Decree" or "Decree" or "CD"). Among other things, the 1991 Consent Decree required Portsmouth: (a) to upgrade the primary wastewater treatment plant ("WWTF") by February 25, 1992 to improve effluent quality to ensure compliance with the effluent limits contained in its then-effective NPDES Permit which authorized a waiver from providing secondary treatment of wastewater; (b) to comply with the interim effluent limits of 6.0 to 8.0 Standard Units for pH and minimum monthly average BOD and TSS removal of 25% and 30% respectively; (c) to prepare and submit a facilities plan by January 1, 1991 assessing combined sewer overflows ("CSOs") abatement alternatives and dry weather overflow ("DWO") elimination measures including an implementation schedule for achieving water quality standards at its CSO outfalls and for elimination of DWOs by no later than February 25, 1992; (d) to continuously measure CSO outfalls 010A and 010B discharge flow and report the discharge and rain event data monthly with the Discharge Monitoring Report forms ("DMRs") beginning no later than April 1, 1990; (e) to implement the CSO abatement projects in accordance with an approved schedule incorporated into the 1991 Consent Decree pursuant to CD Paragraph 9.; and (f) to pay a civil penalty for past violations within 30 days of entry into the decree (i.e. by March 6, 1991 since the decree was approved by the court on February 4, 1991).
6. In a March 5, 1992 letter to EPA, City Engineer David S. Allen advised that construction of the WWTF upgrade was completed and that the plant was fully operational and in compliance with the 1985 NPDES Permit effluent limits as required by Paragraph 6.A.g. of the Decree. Also, the records show that Portsmouth was satisfactorily in compliance with the interim effluent limits contained in Paragraph 7. of the Consent Decree throughout plant construction and startup.
7. EPA records document that Whitman & Howard, Inc. prepared and submitted on behalf of the City the "Combined Sewer Overflow Abatement Program, Portsmouth, New Hampshire" on December 31, 1990 as required by Paragraphs 9.c. and 9.d. of the 1991 Consent Decree.
8. Portsmouth advised EPA in its January 13, 1992 CD Progress Report that the bypass piping at the WWTF was disconnected on December 10, 1991, and the plant began

accepting and treating all dry weather flows thus eliminating recurring DWOs from its CSO outfalls in compliance with the February 25, 1992 deadline of the Decree pursuant to CD Paragraphs 8. and 9.d.

9. EPA records verify that Portsmouth has submitted CSO outfalls 010A and 010B discharge volume and rain event data with its monthly DMRs since April 1, 1990 as required by CD Paragraph 9.b.
10. Although the CSO facilities plan was timely submitted, the recommended CSO abatement program was never formally approved and a schedule for CSO abatement projects implementation was not formally incorporated into the 1991 Consent Decree.
11. The City continued to design and build recommended projects to eliminate DWO discharges and reduce the frequency and volume of CSO discharges. Portsmouth periodically reviewed and revised its CSO facilities plan over the years, doing so most recently in April of 2005 ("2005 Long Term Control Plan"). Portsmouth is continuing to implement recommended CSO abatement projects as revised by the plan updates.
12. A March 8, 1991 letter from the U.S. Department of Justice documents that Portsmouth timely presented a check for \$100,000.00 to the U.S. Attorney's Office as required by CD Paragraph 22.
13. Portsmouth has complied for a period of one year continuously with the 1991 Consent Decree to the satisfaction of the United States Environmental Protection Agency.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: SEPTEMBER 23, 2009

Joy Hilton
Joy Hilton
Boston, Massachusetts